[2022 Gib LR 378]

KINGSTAR UK LIMITED and ROSESTAR PROPERTIES LIMITED v. HASSANS (a firm), LEVY and FELICE

N. ACKERMAN (third party) and B. ACKERMAN (fourth party)

SUPREME COURT (Dudley, C.J.): December 7th, 2022

2022/GSC/031

Civil Procedure—judgments and orders—summary judgment—may be granted if no real prospect of success and no other compelling reason why claim or issue should be disposed of at trial—not granted against claimants who brought claim for dishonest assistance outside 6-year time limit—could not be said that claimants had no realistic prospect of establishing at trial that they could not have discovered alleged fraud with reasonable diligence within time limit (Limitation Act, s.32(1)(a))

The claimants brought claims against the defendants based on dishonest assistance.

The present claim arose from a longstanding dispute between two parts of the Ackerman family. In the 1960s, two brothers, Joseph and Jack Ackerman, established a business ("the Ackerman Group") which they owned in equal shares. After Jack's death, his share and interest in the Group passed to his widow ("Naomi"), the third party. Joseph assumed overall management of the Group, assisted by his son-in-law ("Danny"). Naomi and her son ("Barry"), the fourth party, were also involved in running the Group. The first defendant, Hassans, was a firm of lawyers based in Gibraltar. The second defendant ("Mr. Levy") and the third defendant ("Mr. Felice") were at all material times partners in and/or employees of Hassans. Mr. Levy and Mr. Felice were closely involved in matters concerning the Ackerman Group.

In 2003, Hassans was instructed to advise as to (and ultimately drafted) a trust, the NOF Settlement, which Naomi understood to be for the benefit of both sides of the Ackerman family. The trustee was Line Trust Corp. Ltd. In around 2004, the relations between the two sides of the Ackerman family had begun to deteriorate. By around 2006, Naomi and Barry had become dissatisfied with Joseph and Danny's management of the Ackerman Group. Mr. Thornhill, Q.C. was engaged to mediate between the two sides. Joseph and Naomi agreed in principle to demerge their

respective interests in the Ackerman Group. Ultimately Mr. Thornhill produced reports setting out his findings *inter alia* that Joseph had removed funds from the Group which greatly exceeded the Group's estimated value. The Ackerman Group was restructured such that all of the companies in the Group were transferred to a new single holding company ("Bana One"), of which the shareholders were Naomi and Barry. The defendants claimed that Barry and Naomi bribed Mr. Thornhill.

The claimants claimed that in 2006, prior to the restructure, it was agreed that Joseph could in the interim period continue to carry out transactions on the basis that they would be on his own account, for the benefit of his side of the family only and could be financed using Group funds, assets and equity only if it took the form of a loan, was formally agreed with Naomi on a case-by-case basis, was on commercial terms and was small in terms of the size of the sums involved. Naomi and Barry subsequently became aware of rumours that Joseph was contemplating a substantial investment in two separate large property portfolios. Joseph was informed that he could not use Group assets, including by way of loans. The claimants claimed that Naomi and Barry had no reason to suspect at that time that the defendants, who were aware of the demerger process, were involved in any wrongdoing by Joseph.

The first claimant ("Kingstar") and the second claimant ("Rosestar") were companies incorporated in England and Wales, which at all material times were companies within the Ackerman Group and which, following the restructure, were transferred to Bana One. Their shares were ultimately beneficially owned by Naomi, Barry and other of Naomi's issue.

It was claimed that at all material times prior to the restructure of the Ackerman Group, Joseph and Naomi were equal shareholders in each of Kingstar and Rosestar. Rosestar's main asset was its 100% shareholding in Marylebone Alliance Ltd., a Group company. Kingstar's assets included a 100% shareholding in Lexham Alliance Ltd., another Group company. Investec Trust (Jersey) Ltd. employees and later Investec related companies acted as the directors of Marylebone and Lexham.

In October 2006, the Star Trust was established with Joseph as settlor and Line Trust as trustee. The Star Trust was set up for the intended benefit of Joseph's side of the Ackerman family. The trust was drafted by Hassans. The claimants claimed that it was to be inferred that Mr. Levy and Mr. Felice knew that the Star Trust was established for the intended benefit of Joseph's side of the family. It was also pleaded that Naomi was not made aware of the establishment of the Star Trust. Line Trust, as trustee of the Star Trust, held shares in a number of companies including Enduring Property Holdings Ltd. ("Enduring"). At all material times the directors of Enduring included Mr. Levy, Mr. Felice and a Mr. White, a lawyer and consultant at Hassans. In 2008, the assets of the Star Trust, including the shares in Enduring, were transferred to Line Trust as trustee of the White Star Trust, a trust established for the benefit of Joseph's side of the family and from which Naomi and her side of the family were excluded.

The claimants alleged that in November 2006, Lexham and Marylebone, pursuant to two loan notes, lent to Enduring £1,045,670 and £2,016,190 respectively (albeit the sums were in fact advanced to Baza Ltd., a wholly owned subsidiary of Enduring). The claimants claimed that Joseph unilaterally authorized the loans on behalf of the directors of Kingstar and Rosestar on the purported basis that the consent of the other director (Naomi) was not required. Further, that Mr. Levy and Mr. Felice knew that Joseph could not authorize any such loan on the part of Kingstar and Rosestar without Naomi's consent. No principal or interest was ever repaid and Lexham and Marylebone were ultimately liquidated and dissolved.

The claimants issued their claim on December 18th, 2020. It was summarized in the particulars of claim:

> ". . . the Claimants have suffered loss and damage in the amount of the principal of and interest on or use value of certain loans that were made by their subsidiaries as lenders. These loans were made in circumstances in which one of the then two directors of each of the Claimants acted in breach of his fiduciary duties by inter alia unilaterally authorising the lending without the consent of his co-director and co-shareholder on uncommercial terms that were intended to (and did) favour the borrower, in which the director was personally interested. The Defendants dishonestly assisted those breaches of fiduciary duty and the Claimants claim equitable compensation and/or an inquiry and account of profits accordingly."

Relevant additional background information included a claim ("the NOF claim") issued in 2013 by Naomi and Barry against *inter alia* Line Trust, Mr. Levy and Mr. Felice. That claim concerned the NOF Trust and alleged that the defendants engaged in an unlawful means conspiracy to manage the NOF Trust in order to prefer the interests of Joseph and his side of the family to the detriment of Naomi and her side. The overarching background in relation to the Ackerman Group was common to the NOF claim and the present claim. The NOF claim was settled in 2015. Naomi and Barry provided an indemnity to the defendants to the NOF claim as followed:

> ". . . the Claimants each jointly and severally agree to hold harmless and indemnify each of the Defendants against any claims, demands or actions (including, but not limited to, any claim for contribution, interest or costs), whether known or unknown and of whatever nature and whether in law or in equity, *which arise directly from, indirectly from or in connection with the facts on which the Claims are based or the Claims themselves* . . . The indemnity provided in this Clause is provided solely in relation to Indemnified Claims which are *brought by or on behalf of* any past, present or future member of the NA Class . . ."

The defendants brought three applications in the present proceedings seeking (i) an order pursuant to CPR r.24.2 granting summary judgment to the defendants on the entire claim on the ground that it was time barred ("the limitation application"); (ii) an order pursuant to CPR r.3.4(2)(b) striking out the claim as an abuse of process ("the abuse application"); and

(iii) an order pursuant to CPR r.3.4(2)(a) striking out the defence to the additional claim and/or pursuant to CPR r.24.2 granting summary judgment on the additional claim to the defendants on the ground that the defence to the additional claim disclosed no reasonable grounds for defending the additional claim and/or the third and fourth parties had no real prospect of success in defending the additional claim ("the indemnity application"). The claim to an indemnity was made in the additional claim brought against Naomi and Barry personally.

In relation to the limitation application, the claimants submitted that they discovered the fraud for the purposes of s.32(1)(a) of the Limitation Act on October 2nd, 2020, which was the date when they received Investec documents which revealed to them for the first time the defendants' dishonesty in assisting Joseph's breaches of his fiduciary duties to Kingstar and Rosestar, and the defendants' assistance in respect of Joseph's breaches of his fiduciary duties concerning the November 2006 loan notes. Until they received the Investec documents they did not have a pleadable case of fraud against the defendants. There was no trigger until they received the Investec documents. In the alternative, the claimants submitted that the trigger arose by reason of the developments in other proceedings (the Star Poland proceedings), which occurred later than December 18th, 2014.

The defendants submitted that there was a pleadable case without the Investec documents and that the Investec documents could have been obtained much sooner.

In relation to the indemnity application, the claimants submitted that there was a real prospect that the sharp practice doctrine, if it existed, could be applied. It was also submitted that the indemnity did not apply to the present claims (a) because they were not vested in or capable of being brought by Naomi, Barry or any other member of the NA class (*i.e.* beneficiaries under the BOF settlement consisting of Naomi and her children and remoter issue); and (b) because the present claims were based on different underlying facts.

The defendants submitted that as a matter of construction, the indemnity captured the claims which were the subject of the present proceedings. The scope of the indemnity was expressly wider that the NOF claim. The present claim was connected with the facts of the NOF claim and/or arose indirectly from those facts in that both concerned loans made from Ackerman Group companies to *inter alia* Enduring; both alleged that the loans were made from companies in which Naomi and Joseph had an equal interest to companies in which only Joseph had an interest; both alleged that the defendants acted dishonestly to procure these loans; both relied on the absence of Naomi's consent to the loans as a particular of dishonesty; and both were concerned with losses caused to entities within the Bana One group. It was submitted that given the context, it was plain that the scope of the indemnity extended to the present claim. The defendants opposed the claimants' reliance on the possible doctrine of "sharp practice."

Held, dismissing the applications:

(1) CPR 24.2 provided that the court could give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if it considered that the claimant had no real prospect of succeeding on the claim or issue, or the defendant had no real prospect of successfully defending the claim or issue, and there was no other compelling reason why the claim or issue should be disposed of at trial. The applicable principles were well established. On an application by a defendant, the court must consider whether the claimant had a realistic as opposed to a fanciful prospect of success. A realistic claim was more than merely arguable. In reaching its conclusion, the court must not conduct a mini trial. The court must take into account not only the evidence actually placed before it on the application for summary judgment but also the evidence that could reasonably be expected to be available at trial. The court should hesitate to make a final decision without a trial, even where there was no obvious conflict of fact at the time of the application, where reasonable grounds existed for believing that a fuller investigation into the facts would affect the outcome of the case. It was not generally appropriate to strike out a claim on assumed facts in an area of developing law. Decisions as to novel points of law should be based on actual findings of fact (paras. 63–65).

(2) The claimants in the present case accepted that, subject to the postponing effect of s.32(1)(a) of the Limitation Act, the six-year limitation period for their claims had expired. Section 32(1)(a) provided that where an action was based on fraud, the limitation period would not begin to run until the claimant had discovered the fraud or could with reasonable diligence had discovered it. It was not in issue that a claim for dishonest assistance was an action based on an allegation of fraud. It was well established that pleading fraud was a serious step and such an allegation must be pleaded with sufficient particularity. In the present case, although the overall burden on the summary judgment/strike out applications was on the defendants, the claimants properly accepted that the burden was on them to establish that they could not without reasonable diligence have discovered the alleged fraud before December 18th, 2014 (the present claim having been issued on December 18th, 2020). The question was not whether the claimants should have discovered the fraud sooner, but whether they could with reasonable diligence have done so. The burden of proof was on them to establish that they could not have done so without exceptional measures which they could not reasonably have been expected to take. The state of knowledge that a claimant must have in order to have discovered a fraud was knowledge sufficient to enable him to plead a claim. In some cases, discovery of relevant facts would involve a process over time so that it became difficult to determine when a claimant exercising reasonable diligence could have been able to plead the claim. A claimant would be on notice that there was something to investigate where it would be objectively apparent that something had gone wrong (a trigger), for example where the claimant had lost property, failed to receive something

that he expected to receive, or suffered an injury, which should prompt the claimant to investigate (paras. 66–75).

(3) The question that fell for determination was whether the Thornhill reports and the identification of the losses suffered and/or the NOF claim established a trigger, putting the claimants on notice of the need to investigate the alleged fraud. There would undoubtedly be very many cases in which suffering a loss would of itself make it objectively apparent that something had gone wrong. There was merit in the proposition that (interest aside) the loss of a sum in excess of £3m. would almost always put someone on notice of the need to investigate. However, given the complex factual matrix and Naomi and Barry's alleged exclusion from information, there was a real prospect of success in the claimants' argument that the losses suffered from Lexham and Marylebone did not make it objectively apparent that something had gone wrong (beyond the losses themselves) so as to put the claimants on notice of the need to investigate. In the event that in due course there was a determination that the financial loss was indeed a trigger, on the evidence before the court it would appear that a reasonably diligent investigation would have involved requesting the transactional documents from Investec and that obtaining them would not have proved difficult. Analysis of whether the NOF claim provided a trigger had to be undertaken against the backdrop that Naomi and Barry had knowledge of the losses suffered by Lexham and Marylebone. The court cautioned itself against the danger of hindsight and reminded itself that it was the particular fraud which the claimants needed to be on notice of. For the purposes of the present application, it could properly be argued that given the complex Group structure and in the absence of knowledge and/or understanding by Naomi and Barry of (i) the corporate framework of both the lending and borrowing companies and their directorships; (ii) the requests made by the directors of Lexham and Marylebone; (iii) what in fact was provided to Lexham and Marylebone's directors; and (iv) the defendants' knowledge of Joseph's alleged breaches of his fiduciary duties to the claimants, the NOF claim was an insufficient trigger to put the claimants on notice of the need to investigate the loss and consequently the alleged fraud. The court was fortified in that view given that other professionals acted for the claimants in the transaction, which would arguably weigh against a suspicion that the defendants had acted dishonestly, as would the fact that the defendants were a professional law firm and senior experienced lawyers who were highly regarded. Naomi and Barry might legitimately have not suspected them of what they now claim were further instances of dishonesty. These evidential issues merited examination at trial. For the purposes of a summary judgment application the foregoing was also an answer to the submission that there was a pleadable case without the Investec documents. If there was nothing to put the claimants on notice of the need to investigate, they would not be aware of the alleged dishonesty which was evidently a prerequisite to pleading any such cause of action. The defendants might have the better of the argument but not sufficiently so as to establish that the claimants did not have a realistic

prospect of establishing at trial that they could not with reasonable diligence have discovered the alleged fraud before December 18th, 2014. The application for summary judgment on the issue of limitation would be dismissed (paras. 92–103).

(4) The general principles of the construction of contracts were well established and applicable. The court was concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task was to ascertain the objective meaning of the language used. In the absence of clear language, the court would be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware. There was an issue open to debate as to whether in certain circumstances when a general release was relied upon there existed a doctrine of "sharp practice," *i.e.* where a party to whom a release was given knew that the other party had or might have a claim and knew also that the other party was ignorant of this. In some circumstances, taking a general release in such a case without disclosing the existence of the claim or possible claim could be unacceptable sharp practice (paras. 110–112).

(5) The defendants' application against Naomi and Barry in the additional claim in respect of the indemnity would be dismissed. A submission that the release from claims could in the circumstances in which those claims were known by the defendants but not by Naomi and Barry result in an implied representation that the defendants were not aware of any specific claims which Naomi and Barry might not know about and was one which carried a realistic as opposed to a fanciful prospect of success. Moreover, the sharp practice doctrine was an area of developing law and therefore any decisions in that regard should be based on actual findings of fact. In any event, the application for summary judgment and/or strike out also failed because Naomi and Barry's contentions as regarded the construction of the indemnity were arguable to the required standard. The following could be said in favour of dismissing the application for summary judgment and/or strike out on the indemnity: (i) the language used in the definition of claims covered by the indemnity, *i.e.* "whether known or unknown and of whatever nature and whether in law or in equity, which arise directly from, indirectly from or in connection with the facts on which the claims are based or the claims themselves" was grammatically clear. Whilst the subjective evidence of the parties' intention was irrelevant, ascertaining whether the present claim was "connected" with the facts of the claims as defined in the NOF deed required a detailed examination of and testing of the evidence as to what were the surrounding circumstances at the time that the NOF deed was executed. The present application for summary judgment and/or strike out was not a mini trial and those were not issues which could properly be explored at this stage; (ii) account could properly be taken of the circumstances which existed at the time that the parties

entered into the deed and which were either known or reasonably available to the parties. Whether Naomi and Barry knew or could have reasonably known about the present claims was a live issue for the purposes of limitation but it was also a relevant consideration when interpreting the indemnity; (iii) it was submitted by the defendants that the NOF claim was an attempt by Naomi and Barry to recover the shortfall from the amounts that Mr. Thornhill had found that Joseph ought to pay Naomi. Although it was accurate to say that there was reference in the NOF pleadings to those losses, the scope of the NOF claim was narrower; and (iv) the indemnity was restricted to claims brought by a member of or by or on behalf of a member of the NA class. Claims brought by any other persons or entities were explicitly excluded. Naomi and Barry had a realistic prospect of success in their submission that the defendants' construction subverted the principle of separate corporate personality (paras. 130–132).

(6) The abuse of process application was premised on the arguments advanced for the purposes of the limitation and indemnity applications. The applications for summary judgment and/or strike out on those two issues having been dismissed, it followed that the abuse of process application would also be dismissed (para. 135).

Cases cited:

(1) *ABC Electrification Ltd.* v. *Network Rail Infrastructure Ltd.*, [2020] EWCA Civ 1645; [2021] BLR 97; [2021] TCLR 1; (2020), 193 Con LR 66, considered.

(2) *AC Ward & Son* v. *Catlin (Five) Ltd.*, [2009] EWCA Civ 1098, referred to.

(3) *Allison* v. *Horner*, [2014] EWCA Civ 117, referred to.

(4) *BCCI* v. *Ali*, [2001] UKHL 8; [2002] 1 A.C. 251; [2001] 2 W.L.R. 735; [2001] 1 All E.R. 961; [2001] Emp LR 359; [2001] ICR 337; [2001] IRLR 292, followed.

(5) *Barnstaple Boat Co. Ltd.* v. *Jones*, [2007] EWCA Civ 727; [2008] 1 All E.R. 1124, referred to.

(6) *Begum* v. *Maran (UK) Ltd*., [2021] EWCA Civ 326; [2022] 1 All E.R. (Comm) 940, referred to.

(7) *Bonavia* v. *AXA Equity & Law Life Assur. Socy. plc*, Supreme Ct., May 14th, 2010, unreported, considered.

(8) *Easyair Ltd. (t/a Openair)* v. *Opal Telecom Ltd*., [2009] EWHC 339 (Ch), referred to.

(9) *Federal Deposit Ins. Corp.* v. *Barclays Bank plc*, [2020] EWHC 2001; [2020] 5 CMLR 23, referred to.

(10) *Granville Tech. Group Ltd.* v. *Infineon Technologies AG*, [2020] EWHC 415 (Comm); on appeal, *sub nom. OT Computers Ltd.* v. *Infineon Technologies AG*, [2021] EWCA Civ 501; [2021] Q.B. 1183; [2021] 3 W.L.R. 61; [2021] 4 All E.R. 1095; [2021] BPIR 986, followed.

(11) *Henderson* v. *Henderson* (1843), 3 Hare 100; 67 E.R. 313; [1843–60] All E.R. Rep. 378, referred to.

(12) *Libyan Investment Auth.* v. *Credit Suisse Intl.*, [2021] EWHC 2684 (Comm), referred to.
(13) *Maranello Rosso Ltd.* v. *Lohomij BV*, [2021] EWHC 2452 (Ch), considered.
(14) *Paragon Finance plc* v. *D.B. Thakerar & Co.*, [1999] 1 All E.R. 400; (1999), 1 ITELR 735, considered.
(15) *Playboy Club London* v. *Banca Nazionale Del Lavoro*, [2018] EWCA Civ 2025; [2019] Lloyd's Rep. 90, considered.
(16) *Salkeld* v. *Vernon* (1758), 1 Eden 64; [1758] 28 E.R. 608; [1758] Eng R 153, referred to.
(17) *TFL Mgmt. Servs. Ltd.* v. *Lloyds Bank plc*, [2013] EWCA Civ 1415; [2014] 1 W.L.R. 2006; [2013] 2 CLC 810, considered.
(18) *Tchenguiz* v. *Grant Thornton UK LLP*, [2016] EWHC 865 (Comm), considered.
(19) *Test Claimants in the FII Group Litigation* v. *Revenue & Customs Commrs.*, [2020] UKSC 47; [2022] A.C. 1; [2020] 3 W.L.R. 1369; [2021] 1 All E.R. 1001; [2020] STI 2464; [2020] STC 2387; [2020] BTC 30, considered.
(20) *Three Rivers D.C.* v. *Bank of England (No. 3)*, [2001] UKHL 16; [2003] 2 A.C. 1; [2001] 2 All E.R. 513; 3 LGLR 36, considered.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.24.2: The relevant terms of this provision are set out at para. 63.

Limitation Act 1960 (as amended), s.32(1)(a): The relevant terms of this provision are set out at para. 66.

Limitation Act 1980 (c.58), s.32(1)(a): The relevant terms of this provision are set out at para. 67.

A. Mold, *K.C.* with *J. Holmes* (instructed by Isolas) for the claimants and the third and fourth parties;
R. Stewart, *K.C.* with *S. Pourghadiri* (instructed by Attias & Levy) for the defendants.

1 **DUDLEY, C.J.:** This is the judgment on three applications by the defendants by which they seek:

(i) an order pursuant to CPR r.24.2 granting summary judgment to the defendants on the entire claim, on the ground that the entire claim is time barred ("the limitation application"); and/or

(ii) an order pursuant to CPR r.3.4(2)(b) striking out the claim as an abuse of process in accordance with the principle described in *Henderson* v. *Henderson* (11) ("the abuse application"); and/or

(iii) an order pursuant to CPR r.3.4(2)(a) striking out the defence to the additional claim and/or pursuant to CPR 24.2 granting summary judgment

on the additional claim to the defendants, on the grounds that the defence to the additional claim discloses no reasonable grounds for defending the additional claim and/or the third and fourth party have no real prospect of success in defending the additional claim ("the indemnity application").

2 In very short, the claims against the defendants are premised upon allegations of dishonest assistance. These are vigorously denied, although it is not in dispute that the applications fall to be determined on the premise that the factual allegations advanced by the claimants and the third and fourth parties are true. In setting out the factual background I draw primarily from the particulars of claim, with the caution that aspects thereof are either denied or not admitted by the defendants.

Background

3 The present claim is a by-product of a long-standing dispute between two parts of the Ackerman family. In the 1960s, the brothers Joseph and Jack Ackerman ("Joseph" and "Jack") established a business for the purchase, sale and letting of UK-based properties. The business operated through a number of companies and had, prior to a restructure to which I shall return, no single ultimate holding company ("the Ackerman Group" or "the Group"). Joseph and Jack owned the Ackerman Group in equal shares until Jack's death in 1989. After Jack's death his share and interest in the Ackerman Group passed to his widow ("Naomi") the third party, who became joint owner in equal shares with Joseph.

4 Following Jack's death Joseph assumed overall management control of the Ackerman Group, assisted by his son-in-law Danny Wulwick ("Danny"). Naomi and her son Barry Ackerman, the fourth party ("Barry") were also involved in the running of the Group, albeit the extent of such involvement is not agreed.

5 The first defendant ("Hassans") is a firm of lawyers based in Gibraltar. Hassans specializes amongst other things in contentious and non-contentious matters concerning trusts and companies and provides, including through its subsidiaries, partners and employees, services as trustee or company director. The second defendant ("Mr. Levy") and the third defendant ("Mr. Felice") were at all material times partners in and/or employees of Hassans. Mr. Levy and Mr. Felice were each closely involved in matters concerning the Ackerman Group.

6 The relationship between the defendants (and in particular Mr. Levy and Mr. Felice) and the Ackerman Group dates back to at least 2003. In around 2003, Hassans, acting by Mr. Levy, was instructed to advise as to (and Hassans ultimately drafted) a trust known as "the NOF Settlement," which Naomi understood was to be for the benefit of both sides of the Ackerman Family.

7 The trustee of the NOF Settlement was Line Trust Corp. Ltd. ("Line Trust") a company ultimately beneficially owned by the partners of Hassans, and its officers included partners and/or employees of Hassans. Following the establishment of the NOF Settlement, Mr. Levy in particular, in the ordinary course of Hassans' business, held himself out as (and Naomi understood him to have become) a trusted advisor to both sides of the Ackerman family.

8 In around 2004, the relations between the two sides of the Ackerman family, with Naomi and Barry on one side and Joseph and Danny on the other, had begun to deteriorate. By around 2006, Naomi and Barry had become dissatisfied with Joseph and Danny's management of the Ackerman Group and the relationship had broken down. Mr. Andrew Thornhill, Q.C. ("Mr. Thornhill") was engaged to mediate between the two sides of the family and at a meeting in his chambers on February 15th, 2006, Joseph and Naomi agreed in principle to demerge their respective interests in the Ackerman Group. That agreement led to "the restructure" several years later, which is pleaded in the particulars of claim at para. 28 as follows:

> "The proposed de-merger did not proceed for some time. It ultimately resulted in Mr Thornhill's provisional report of 5 January 2011 and final report of 11 February 2013. Pursuant to Mr Thornhill's findings in those reports, the Ackerman Group was restructured such that all of the companies were transferred to a new single holding company ('Bana One') ('the restructure'). Bana One is a company incorporated under the laws of England and Wales on December 30th, 2010 . . . Its directors have at all times included Naomi, and Barry was further appointed on 11 March 2011. Its shareholders are Naomi and Barry. This outcome followed the findings by Mr Thornhill inter alia that Joseph had removed a balance of £61.23 million from the Group, which greatly exceeded the estimated value of 100% of the Group at that time, let alone 50%."

9 At para. 26 of their defence it is the defendants' pleaded case that Barry and Naomi bribed Mr. Thornhill. Some background to this allegation is to be found in Mr. Sunil Chandiramani's (a partner at Attias & Levy) first witness statement (with the evidence then significantly developed in a responsive second witness statement following certain denials by Barry in his witness statement). The circumstances in which Mr. Thornhill made those awards was the subject of a claim brought by Joseph in the English courts. Joseph alleged that Mr. Thornhill's award had been procured by bribes paid by Naomi and Barry. In the English High Court, Snowden, J. determined that Joseph's claim was barred by the principles of *res judicata* and struck it out *Ackerman* v. *Thornhill* ([2017] EWHC 99 (Ch)). Those or related allegations have also been the subject of proceedings against Mr. Thornhill by the English Bar Tribunals and Adjudication Service. The

defendants' application is made on the basis that this is not an issue for determination in the course of these applications. Nor could it be, because undoubtedly it is not an allegation which could properly be resolved without oral evidence.

10 Returning to events in 2006, long before the restructure, it is the claimants' case (to whom I shall turn to shortly) that at the meeting on February 15th, 2006 and in subsequent correspondence it was agreed that Joseph could in the interim period prior to the proposed demerger continue to carry out transactions on the basis that the transactions would be on his own account, for the benefit of Joseph's side of the family only and could be financed using Group funds, assets or equity only if it:

(a) took the form of a loan;

(b) was formally agreed with Naomi on a case-by-case basis;

(c) was on commercial terms;

(d) would be small in terms of the size of the sums involved.

Additionally, that Joseph would be transparent with Naomi and would discuss any such transactions with her.

11 In the next few months Naomi and Barry became aware of rumours that Joseph was contemplating a substantial investment in two separate, large property portfolios. At Barry's instigation various meetings were held with Joseph in September and October 2006 the upshot of which was that Joseph was informed that he could not use Group assets, including by way of loans, to finance any such investment on his own account.

12 In October 2006 Naomi's English solicitors, "BCLP" (then "BLP") prepared a draft letter to Joseph ("the October 2006 letter") in which they sought details of transactions upon his own account for his side of the family carried out in that calendar year, so that Naomi could satisfy herself that no Group assets were involved. In particular the letter provided:

> "Mrs Ackerman is concerned that these transactions that you have recently carried out should be transparent and should not in any way improperly impact upon the Group or its assets and has asked you for your assurance on this. To date she has not received a satisfactory answer to those queries. Accordingly, Mrs Ackerman has asked us to write to you on the lines set out in this letter . . .
>
> . . . Until Mrs Ackerman has confirmed in writing that she is satisfied as to how these transactions have been structured and that they have had no improper impact on the Group, she has asked us to inform you that her consent to you to carry out any further such transactions has been withdrawn."

The October 2006 letter was attached to an email that was sent by Barry to Mr. Levy on October 11th, 2006. It is the claimants' case that neither Barry nor Naomi had any reason to suspect at this time that the defendants, who were aware of the demerger process, were involved in any wrongdoing on the part of Joseph and that by providing the October 2006 letter the defendants were put on notice that Naomi's consent to Joseph carrying out any transactions on his own account concerning the Group and its assets had been withdrawn.

13 On October 16th, 2006 the October 2006 letter was sent in final form to Joseph, the contents of which was substantially the same as the draft that Mr. Levy received on October 11th, 2006.

The present claim

14 The claim is summarized at para. 1 of the particulars of claim as follows:

> "In short summary, and without prejudice to the further particulars below, the Claimants have suffered loss and damage in the amount of the principal of and interest on or use value of certain loans that were made by their subsidiaries as lenders. These loans were made in circumstances in which one of the then two directors of each of the Claimants acted in breach of his fiduciary duties by inter alia unilaterally authorising the lending without the consent of his co-director and co-shareholder on uncommercial terms that were intended to (and did) favour the borrower, in which the director was personally interested. The Defendants dishonestly assisted those breaches of fiduciary duty and the Claimants claim equitable compensation and/or an inquiry and account of profits accordingly."

The parties, other *dramatis personae* and trust structures

15 The first claimant ("Kingstar") and the second claimant ("Rosestar") are companies incorporated in England and Wales, which at all material times were companies within the Ackerman Group and which following the restructure were transferred to Bana One, their shares are thereby ultimately beneficially owned by Naomi, Barry and other of Naomi's issue (see reply 13.2).

16 The directors of Kingstar are or were:

(i) at all material times up to December 30th, 2010: Joseph and Naomi;

(ii) December 30th, 2010 to February 14th, 2011: Naomi; and

(iii) February 14th, 2011 to date: Barry and Naomi.

The directors of Rosestar are or were:

(i) at all material times to March 26th, 2010: Joseph and Naomi;

(ii) March 26th, 2010 to December 30th, 2010: Joseph, Naomi and Mr. Thornhill;

(iii) December 30th, 2010 to February 14th, 2011: Naomi and Mr. Thornhill;

(iv) February 14th, 2011 to May 21st, 2012: Barry, Naomi and Mr. Thornhill; and

(v) May 21st, 2012 to date: Barry and Naomi.

Given their directorships, Naomi's and Barry's knowledge is to be imputed to the claimants.

17 At para. 5 of the particulars of claim the pleaded case is that at all material times prior to the restructure of the Ackerman Group, Joseph and Naomi were in equal shares the shareholders in each of Rosestar and Kingstar. Subsequent paragraphs plead a slightly more nuanced position as regards Kingstar.

18 Rosestar's main asset was its 100% shareholding in Marylebone Alliance Ltd. ("Marylebone") a company incorporated in BVI but tax resident in Jersey. Marylebone was at all material times a Group company.

19 As regards Kingstar, it is said that at all material times prior to the restructure, the shareholder of Kingstar was Superetto Ltd. ("Superetto") a company incorporated in England and Wales. The shareholders of Superetto were Joseph and Naomi, in equal shares, with the shares held by them as trustees pursuant to a number of trusts, for the benefit of their respective issue. At all material times Kingstar's assets included its 100% shareholding in Lexham Alliance Ltd. ("Lexham") a company incorporated in BVI but tax resident in Jersey. Lexham was at all material times a Group company.

20 At all material times prior to April 2nd, 2012 a number of employees of Investec Trust (Jersey) Ltd. ("Investec") acted as the directors of each of Marylebone and Lexham. At all times from April 12th, 2012 until their respective dissolutions in 2016, the joint directors of both Marylebone and Lexham were Investec related companies.

21 As aforesaid, Mr. Levy and Mr. Felice were each closely involved in matters concerning the Ackerman Group and other companies relevant to the claimants' claim. The pleaded case is that Mr. Levy and Mr. Felice had a number of overlapping and shared roles including acting as co-directors of companies and that given these roles and their position as colleagues in the same law firm, it is to be inferred that in the context of the transactions that are the subject of the claim, they each informed the other of the matters in which they were involved and of which they became aware in the course of the same. It is further pleaded on the claimants' behalf that it is to be

inferred that all the relevant actions and decisions taken by Mr. Felice, said to underpin the claim, were taken with the knowledge and approval of Mr. Levy.

22 On or around October 10th, 2006 a trust known as "the Star Trust" was established by deed with Joseph as settlor and Line Trust as trustee. The Star Trust was set up for the intended benefit of Joseph's side of the Ackerman family and not Naomi or her side of the Ackerman family. It was a discretionary trust governed by the laws of Gibraltar. The Star Trust was drafted by Hassans. It is the claimants' case that it is to be inferred that Mr. Levy and Mr. Felice knew that the Star Trust was established for the intended benefit of Joseph's side of the Ackerman family and not Naomi or her side of the Ackerman family. It is further pleaded that Naomi was not made aware of the Star Trust having been established, whether in her capacity as a director or shareholder of Kingstar or Rosestar, or at all.

23 Line Trust, in its capacity as trustee of the Star Trust, held directly or indirectly shares in a number of companies including those in Enduring Property Holdings Ltd. ("Enduring") a company incorporated in Gibraltar. At all material times, the directors of Enduring included Mr. Levy, Mr. Felice and Mr. Christopher White ("Mr. White") a lawyer and consultant at Hassans.

24 On or around April 3rd, 2008 the assets of the Star Trust, including the shares in Enduring, were settled upon and/or transferred to Line Trust, as trustee of the trust known as "the White Star Trust." The White Star Trust was a discretionary trust also governed by the laws of Gibraltar, set up for the benefit of Joseph's side of the Ackerman family. Naomi and her side of the family were excluded from the class of discretionary beneficiaries.

The alleged objectionable transaction

25 In brief, the pleaded case is that against the backdrop of the proposed demerger and the October 2006 letter, in November 2006, Lexham and Marylebone pursuant to two "loan notes" lent to Enduring £1,045,670 and £2,016,190, respectively. Albeit the sums were in fact advanced to Baza Ltd. ("Baza") (an Isle of Man company) which was a wholly owned subsidiary of Enduring.

26 In the particulars of claim the transaction is particularized in some detail in relation to the negotiation, authorization, drafting and execution. Those particulars are derived from information contained in "the Investec documents" which were provided to Barry in circumstances to which I shall return.

27 The pleaded case is that during the course of November 2006 exchanges of correspondence took place between Mr. Felice and various individuals. On November 8th, 2006 Jenny Cottrell, a lawyer at Shepherd

and Wedderburn LLP who acted for Lexham and Marylebone, sent an email to Phillip Burton and Graeme Mourant (Mr. Burton and Mr. Mourant being, at the time, along with Robert Clifford, directors of both Lexham and Marylebone), Danny, Mr. Felice and others. This provided, *inter alia,* as follows:

> "We have recently been exchanging e-mails in relation to the return by [Lexham] and [Marylebone] of the net proceeds of sale of the properties owned by them now that the tax deposit in each case has been released by Investec.
>
> [Mr. Burton] I think you raised the question as to the means by which the funds should be returned. Having reviewed the file and the alternatives available, it is preferable for the time being that the funds are not repatriated either by dividend or some sort of return of capital but instead are redeployed by the making of loans. This is consistent with the position regarding other funds realised by these companies which have been lent to [New Liberty] at a rate of interest.
>
> The proposal therefore is that both Lexham and Marylebone should consider making loans at a similar (7%) rate of interest to [Enduring], a recently formed Gibraltan company which is the new holding company for Isle of Man entities that are currently in the process of acquiring a portfolio of properties for an aggregate consideration of £187 million. [Enduring] would borrow the funds and issue loan notes to [Marylebone] and [Lexham] on similar terms to those issued by [New Liberty] last year . . .
>
> Assuming that this proposal is acceptable to [Lexham and Marylebone], I assume that what will be required will be a form of loan note for consideration and in due course, board minutes etc. Is there anything else that will be required at this stage—for example. any [know your client checks ('KYC') on [Enduring] and some background as to the ownership of [Enduring]? . . ."

The claimants' case is that given their various roles, Mr. Levy and Mr. Felice would have known that any such lending to Enduring by Lexham and Marylebone would have been fundamentally different to the loans that had previously been made by Lexham and Marylebone to New Liberty, given that New Liberty was a company held by Line Trust as trustee of the NOF Settlement (intended to benefit both sides of the Ackerman family) and as such that lending was intra-Group lending. By contrast, Enduring was held by Line Trust as trustee of the Star Trust, intended to benefit only Joseph's family, and was therefore not part of the Ackerman Group.

28 On November 13th and 14th, 2006, Mr. Felice received emails detailing what the directors of Lexham and Marylebone would require to take the proposal forward. Crucially it included a draft letter which was to

be provided by the shareholders of Lexham and Marylebone confirming their agreement to the subscription of the loan notes. This included no signature block for Naomi and only one for Joseph.

29 In subsequent email exchanges Mr. Felice provided Mr. Burton with a KYC pack and Mr. Burton circulated a re-draft of the draft shareholder letter that he had attached to his earlier email, which again included no signature block for Naomi and only one for Joseph. Also on November 14th, 2006, Ms. Cottrell sent an email to Mr. Felice (and others), saying Shepherd and Wedderburn LLP would organize the shareholder letters via Danny. It is the claimants' case that Mr. Levy and Mr. Felice knew that Danny was Joseph's "right hand man" and that the implication from this email was that Shepherd and Wedderburn LLP would contact only Joseph's side of the family, who were interested in both sides of the proposed transaction, and not Naomi's. And that in any event, there was no suggestion that Shepherd and Wedderburn LLP, or anyone else, was going to contact Naomi.

30 That same day Joseph signed a separate letter on behalf of each of Kingstar and Rosestar, unilaterally authorizing, in their capacity (respectively) as shareholder of Lexham and Marylebone, the proposed loans to Enduring. The material paragraph in each of the letters reads:

> "In our capacity as shareholder of [Lexham Alliance Ltd.] [Marylebone Alliance Ltd.] we hereby confirm our agreement, assuming such agreement may be necessary, to the subscription of the above loan note."

It is the claimants' case that Joseph thereby unilaterally authorized the proposed loans on behalf of the directors of each of Kingstar and Rosestar on the basis that the consent of the other director (Naomi) was not required. Further, that Mr. Levy and Mr. Felice each knew that, in particular following the October 2006 letter, Joseph could not sign any such letter alone, with no signature from Naomi, for the proposed loans to Enduring and/or could not authorize any such loan on the part of Kingstar or Rosestar without Naomi's consent. Further that it would have been obvious to Mr. Felice and Mr. Levy that Naomi's consent had not been obtained, and consequently that the directors of Lexham and Marylebone had not obtained the shareholder agreement that they required and/or had sought and thought that they had obtained.

31 There then followed further email exchanges as to whether the proposed transactions would be by way of loan notes, loan agreements or both, with Mr. Felice, it appears, circulating both loan agreements and loan note instruments in draft form and indicating that his preference was to proceed by way of loan note instruments alone. It is further pleaded that by virtue of various communications it is to be inferred that Mr. Felice provided bank details for an account held not by Enduring but by Baza,

albeit that it is not in issue that the shares in Baza were (directly or indirectly) wholly owned by Enduring.

32 During the course of November 16th, 2006 Enduring, by a resolution of its board of directors (which included Mr. Levy and Mr. Felice), issued the two loan notes. These were each signed by Mr. Felice and Mr. White. Enduring further issued loan note certificates, pursuant to the terms of the loan notes, to Marylebone and Lexham, providing that each held the entirety of each of the respectively issued notes. These certificates were each also signed by Mr. Felice and Mr. White. Mr. Burton, Mr. Mourant and Mr. Clifford, as directors of each of Marylebone and Lexham, resolved by respective signed written resolutions, *inter alia*, that the participation in the loan notes be approved. The recitals to each of the resolutions included in terms, that Rosestar and Kingstar, being respectively Marylebone's and Lexham's sole shareholder, had confirmed its agreement to the loan.

33 On November 17th, 2006, Lexham and Marylebone advanced the principal moneys pursuant to the respective loan notes. It is said that at that time, the principal moneys comprised all of the cash held by each of Lexham and Marylebone.

34 On or around November 22nd, 2006, enclosed under a covering letter written on Hassans' letterhead and bearing that date, Mr. Felice sent the original loan notes to the directors of Lexham and Marylebone. Whilst reserving the right to plead further following disclosure, the claimants do not know and make no admissions as to how the loan moneys as were advanced by Lexham and Marylebone were spent and/or used by Enduring and/or Baza, save that they say that it is to be inferred that these sums were spent and/or used by Enduring and/or Baza at the direction of Joseph and/or Danny.

35 The loan notes were respectively issued by Enduring in the amount of £1,045,670 as regards Lexham and £2,016,190 as regards Marylebone, to be repaid in full by Enduring on or by November 16th, 2011. Save that the principal and any accrued interest would be immediately repayable in full if Enduring failed to make any payment, including as to interest, within 14 days of that sum falling due under the loan notes. The loan notes did not provide any security to Lexham or Marylebone. In the event no amount of the principal or interest was ever repaid. Lexham and Marylebone were ultimately liquidated and dissolved.

36 The claim is premised upon three core issues:

(1) Joseph's alleged breaches of his fiduciary duties to the claimants;

(2) the defendants' alleged assistance of those; and

(3) the defendants' alleged awareness at the time of the facts and matters that made that assistance dishonest.

Joseph's alleged breaches of fiduciary duty

37 In very short, Joseph's breaches of fiduciary duty are said to include:

(i) his unilaterally approving on the part of Kingstar and Rosestar the lending by Lexham and Marylebone to Enduring, contrary to the articles of association of each company;

(ii) approving the loans to Enduring which was a company within the Star Trust structure in which only his side of the family had an interest and he had a direct (or indirect) personal interest which was in conflict with the interests of and/or his duties to Kingstar and Rosestar which he did not disclose to Naomi; and

(iii) approving the loan notes which not being on commercial terms were therefore not in the best interests of Kingstar and Rosestar.

38 On the basis of the foregoing, it is said for the claimants that it should be inferred that Joseph intended to (and did) prefer the interests of Enduring and/or Baza over those of Kingstar and Rosestar.

The defendants' alleged assistance

39 The claimants' case is that the defendants' assistance of Joseph's breaches was extensive. This is said to include:

(i) the incorporation and/or settlement of the borrower entities, namely Enduring, Baza and the Star Trust;

(ii) their procuring that the transactions should take effect by way of loan notes;

(iii) the drafting of the loan notes;

(iv) their issuing the loan notes on the part of Enduring, as its directors;

(v) the provision of various information to various persons to allow the transactions to proceed; and

(vi) the deliberate failure to raise the question of Naomi's consent (which would not have been given) with Lexham, Marylebone, their directors or their lawyers.

Dishonesty

40 The claimants' pleaded case is that the dishonesty is made out in light of the defendants' awareness of various matters, including:

(i) that Joseph had unilaterally authorized the loans without Naomi's consent, aware of Naomi's position pursuant to the October 2006 letter as well as more generally that the Group was at that time undergoing the demerger of the two sides' interests;

(ii) that the loans were from jointly owned companies to those owned exclusively for the benefit of Joseph's side of the family;

(iii) that the loans were on uncommercial terms that favoured the borrower; and

(iv) given their expertise as lawyers who acted in this very field, that Joseph was seeking to prefer his own side of the family's interests, in breach of his fiduciary duties.

Additional background

41 Of relevance to the defence of limitation and therefore evidently to the present applications and in particular to the question of whether the claimants could with reasonable diligence have discovered the alleged fraud, are the Thornhill reports; claim 2012-N-195 ("the NOF claim") brought by Naomi and Barry against, *inter alia*, Line Trust, Hassans, Mr. Levy and Mr. Felice; and claim 2016-Ord-094 ("the Star Poland claim") brought by the liquidator of Star Poland Ltd. against its former directors.

The Thornhill reports

42 As aforesaid, by around 2006 Naomi and Joseph agreed that Mr. Thornhill would assist in demerging their respective interests in the Ackerman Group. That agreement was formalized in a series of agreements dated September 22nd, 2008, December 5th, 2008 and June 25th, 2009. Essentially it was agreed that Mr. Thornhill would undertake a lottery to decide how the Group assets should be allocated between Joseph's and Naomi's sides of the family. The purpose of the exercise would be to apportion randomly 50% of the Group companies to each side of the family with Mr. Thornhill thereafter conducting an adjustment exercise to ensure that both sides of the family were awarded with assets of equal value. An email dated October 26th, 2010 sent on behalf of Mr. Thornhill under the subject "The Way Forward" identified adjustments proposed by Naomi including funds taken from Lexham and Marylebone, with Mr. Thornhill taking account of these in his provisional report of January 5th, 2011 ("Thornhill's provisional report") in which he stated:

> "[5] E
>
> Lexham Alliance.
>
> The Deloitte Report suggests that the loan of £2,049 million be written off. The arrangements for the making of this loan were, I find, made by JA [Joseph]. While he was no doubt acting in what he thought were the group's best interests, [Naomi's] side were not properly consulted and would probably have objected to the arrangement if they had been. This loss as well as the smaller one of £1.045 million must, in my view, fall on JA."

And later at 6 C of the report:

> "The Alliance Transactions
>
> (i) I have dealt with Lexham Alliance at 5 (E) above.
>
> (ii) There is no mention in the Deloitte Report of Marylebone Alliance, a 50/50 company. One half of the losses attributable to Marylebone Alliance should, in my view, be made good by JA. They arose either from the liberty 1 investment or from a private investment made by JA. The capital invested and lost was £7,716,190. Interest amounts to £2,212,800. The amount to be accounted for is thus £4,964,495."

It is not in dispute that the "smaller one" was a reference to the loan made by Lexham to Enduring and the "capital invested and lost" included the loan made by Marylebone to Enduring.

43 In his provisional report Mr. Thornhill found that in light of the scale of Joseph's withdrawal of assets from the Group and the low net value remaining, the whole of the remaining Group should be awarded to Naomi, with a further additional balance owing to Naomi of £20m.

44 Instead of bringing the demerger process to a close, the provisional report led to the first set of (English) proceedings brought by Joseph challenging Mr. Thornhill's decision. Those proceedings were dismissed by Vos, J. in a judgment of December 21st, 2011 [*Ackerman* v. *Ackerman*, [2011] EWHC 3428 (Ch)]. Of some note are the findings (*ibid.*, at para. 177):

> "It is plain to me that, throughout the de-merger process, Joseph and Danny tried to ensure that information was not provided openly or timeously to Naomi and Barry about the transactions they were engaged upon. I am not certain whether they were refusing information because, as they saw it, they were engaged in dishonest transactions, or because they had such disrespect and personal dislike of Naomi and Barry that they wanted to do anything they could to upset them, or because they wanted to slow down or scupper the de-merger process entirely. It probably is not crucial to the issues I have to decide. During Danny's cross-examination, there were numerous further occasions upon which it was put to him that information had been withheld or concealed. His answers were evasive and unreliable. I am entirely satisfied that Joseph and Danny deliberately withheld information from Naomi and Barry and made it impossible for Naomi properly to perform her director's duties, and that their campaign continued throughout the process that Mr Thornhill undertook."

And later (*ibid.*, at para. 346):

> "It is crucial to understand at the outset the extraordinarily difficult task that Mr Thornhill had agreed to undertake. Many less resilient people might have gone so far as to say that Mr Thornhill was mad to have done so. But that does not make him unfair. In my judgment, his conduct, whilst it was somewhat unwise in a number of minor respects that I have dealt with, and will deal with, was always fairly and properly directed toward obtaining the right answer for the benefit of both sides. To say that Joseph placed obstacles in Mr Thornhill's path towards this end is a substantial under-statement. Joseph came close to making Mr Thornhill's task impossible. I have already said that I formed the view that this was, at least on one analysis, his objective. It is very likely that he did not really want to be required to separate the Group; rather he wanted to be allowed to continue to run the Group in his own way, using Naomi's half interest without consulting her, as he had always done. To that end, he and Danny simply refused to provide Mr Thornhill with the information necessary to allow him to undertake the process to which they had signed up."

Joseph obtained permission to appeal on a narrow point of law, following which the proceedings were compromised. Thereafter there was an amended form of the provisional report dated August 15th, 2012, in which the balance left owing to Naomi increased to approximately £42m., with a final report of February 11th, 2013 settling that balance at £36.225m.

45 The various reports by Mr. Thornhill also dealt with the NOF Trust. The introductory sentences of Thornhill's provisional report at para. 5(C) serve to provide some context:

> "It has been difficult to obtain information concerning this trust. Two versions of the list of the beneficiaries for the trust have come to light. One version suggests that the trust was for both sides of the family. Another suggests that this might not have been so. The handling of investments has been closely managed by [Joseph] and [Danny] and there has been close communication between [Joseph] and [Danny] on the one hand and Hassans acting for the trustees on the other. [Naomi] and [Barry] and their advisers have been excluded from these communications."

46 It is also of note that according to Barry, when first engaging in the demerger process and identifying what he and Naomi believed Joseph should account for, that he and Naomi undertook that task themselves. Although in around 2008 they instructed a Mr. Portnoy to assist them, which led them to become aware for the first time (amongst other things) of the loans from Lexham and Marylebone to Enduring.

The NOF claim

47 The NOF claim was issued on July 8th, 2013 by Naomi and Barry against *inter alia* Line Trust, Hassans, Mr. Levy and Mr. Felice.

48 The claim is summarized in the draft re-amended particulars of claim in the NOF claim (although never formally permitted or consented to, I will refer to this as "the NOF particulars of claim"). I shall have cause to turn to certain amendments to the NOF particulars of claim, which have been referred to as the Wallshire allegations in respect of which the date of the amendment bears some consideration. The NOF claim was focused upon the NOF Trust, with the claim summarized in the particulars of claim as follows:

> "8. By way of summary (and without prejudice to the more particularised facts and claims pleaded further below):
>
> 8.1. The Defendants engaged in an unlawful means conspiracy with the common aim that the NOF Trust would be managed in order to prefer the interests of JA and his side of the Ackerman family to the detriment of NA and her side of the Ackerman family.
>
> 8.2. In furtherance of this conspiracy, the Defendants, amongst other things:
>
> (i) were willing to, and did, act at the behest of JA rather than give independent thought to whether investments were in the best interests of the NOF Trust or its underlying companies;
>
> (ii) entered into purported loans amounting to £11,687,067 with companies in which JA and his side of the Ackerman family were interested (but in which NA and her side of the Ackerman family were not) which were: (a) not in the best commercial interests of the NOF Trust or its underlying companies; but (b) to the advantage of JA and his side of the Ackerman family (at the expense of NA and her side of the Ackerman family);
>
> (iii) entered into such purported loans despite: (a) failing to carry out any analysis of their own (or obtain independent professional advice) about the commercial wisdom of the purported loans; (b) being aware that JA and NA were undertaking a demerger of their interests and that their respective interests were not aligned; and (c) being aware that JA had agreed with NA that pending completion of the demerger, jointly-owned assets (which included assets held within the NOF Trust) would not be used without NA's prior agreement;
>
> (iv) subsequently failed to take any action to recover the purported loans or interest advanced from the counterparties;

(v) withheld information from NA and others about the NOF Trust and its underlying assets despite being aware that this information was necessary for a fair demerger of JA and NA's interests;

(vi) prepared a sham document purporting to set out the class of beneficiaries of the NOF Trust which did not contain NA, her children or remoter issue. The Defendants now accept that this document is invalid.

8.3. In addition to NA's cause of action for unlawful means conspiracy, the ~~Defendants~~ Claimants have causes of action for

(i) breach of trust (which was dishonest); and

(ii) dishonest assistance.

8.3A. Further, NA has a cause of action against Hassans for breach of a common law duty of care and/or breach of fiduciary duty.

8.4. NA claims damages and alternatively the Claimants seek equitable compensation and other relief in the sum of at least ~~£11.687.067~~ approximately £27.474 million. The other relief sought includes the removal of Line Trust as trustee of the NOF Trust."

49 The overarching background in relation to the Ackerman Group is common to the NOF claim and the present claim, as is the decision to demerge and the draft letter of October 11th, 2006 provided to Mr. Levy by which it is said that he became aware of Naomi's requirement for consent before using Group assets.

The loans the subject of the NOF claim

50 Naomi and Barry's case was that all funds contributed to the NOF Trust or its underlying companies, other than derived from bank borrowing had derived from the Ackerman Group. That Line Trust *qua* trustee of the NOF Trust, through nominee shareholders held all of the shares in Brayfield International Ltd. ("Brayfield"). That Mr. Levy and Mr. Felice were, at all material times, directors of Brayfield. That Brayfield owned all of the shares in New Liberty Property Holdings Ltd. ("New Liberty") and 90% of the shares in Rosara Properties Ltd. ("Rosara"). Further that Mr. Levy and Mr. Felice were also, at all material times, directors of New Liberty and Rosara.

51 It was Naomi and Barry's case Line Trust, *qua* trustee of the Star Trust, owned directly or indirectly Enduring (which also features in the present claim), Maxtel Holdings Ltd. ("Maxtel") and Carlton Holdings Ltd. ("Carlton"). The pleaded case was that at all material times Mr. Felice was a director of Enduring, Carlton and Maxtel whilst Mr. Levy was a director of Enduring and Maxtel.

52 In November 2006, it is said at Joseph's instigation, Enduring, Carlton and Maxtel acquired two large property portfolios known as the Royal Portfolio and the Liberty 2 Portfolio and that in order to assist in financing the purchase, Rosara refinanced its loan facility with RBS and both Rosara and New Liberty made various purported loans, namely:

(i) £4.5m. unsecured loan by Rosara to Enduring;

(ii) £5,913,076 unsecured loan by Rosara to Maxtel;

(together "the Rosara loans") and

(iii) £1m. unsecured loan by New Liberty to Carlton;

(iv) further sums of £150,000 and £124,000 loaned by New Liberty to Carlton which were not documented;

(together "the New Liberty Loans").

53 In the NOF claim it was Naomi and Barry's case that the loans were made with the knowledge of and arranged by Mr. Levy and Mr. Felice and that despite the October 2006 letter, neither Naomi nor Barry was aware that the loans had been made and no attempt was made to obtain their consent or to even inform them of their existence.

54 When on April 3rd, 2008, the Star Trust was replaced by the White Star Trust, Line Trust remained the owner of Enduring, Maxtel and Carlton *qua* trustee of the White Star Trust.

55 In common with the present claim no interest or capital was repaid to Rosara or New Liberty under the loans.

56 In April 2015 the NOF particulars of claim were re-amended with the introduction of a new paragraph, para. 60.3A, which introduced what has been referred to as the Wallshire allegations. Wallshire was a company of the Ackerman Group, but was not a NOF Trust company. As alluded to before, the date of the amendment is relevant. The paragraph reads:

> "Further, the Defendants assisted [Joseph] in the making of the following loans from a company within the Ackerman Group to companies within the Star Trust despite the Defendants knowing that [Naomi] (who was a director of the Ackerman Group companies and whose consent to any loans was a prerequisite to their lawful making) had not agreed to the making of such loans or alternatively being reckless (by turning a blind eye) to whether [Naomi] had so agreed. The loans comprised:
>
> (i) £6 million from Wallshire Ltd. ('Wallshire') to Maxtel (for the purpose of the purchase of the Liberty 2 portfolio): and
>
> (ii) £5 million from Wallshire to Carlton (for the purpose of the purchase of the Royal portfolio)."

Settlement of the NOF claim

57 The NOF claim was, by virtue of a settlement deed dated July 3rd, 2015 ("the settlement deed") compromised for a substantial sum. By virtue of cl. 9 of the settlement deed, Naomi and Barry provided an indemnity to the defendants of the NOF claim which is the basis for the indemnity application.

The Star Poland claim and Barry's investigation into the present claim

58 The relevance of the Star Poland claim is that according to Barry's first witness statement, his concerns in relation to actions taken by Hassans changed after those proceedings were issued. His explanation as to the stance taken by him and Naomi prior to the Star Poland claim is set out at paras. 77 and 78 of his witness statement, as follows:

> "77. It would have been an enormous leap to assume that because we had concerns as regards their role in relation to the Nof Trust, that this meant their roles across all other transactions should also come under suspicion and require immediate investigation. As I have said, we had no basis to assume at the time that the Defendants (i) had the extent of the role that they did in relation to the Lexham and Marylebone loans (as to which they were merely directors of the borrower entity within the Star Trust, and had no role on the lender-side, the Claimants being outside of the Nof Trust structure), and (ii) knew that shareholder consent had been sought for these loans by Investec, the professional service directors of Lexham and Marylebone, and that no such consent had been sought or obtained from Naomi. There was no basis to assume that they were involved in any particular wrongdoing concerning those loans, let alone a fraud; that of course being a very serious allegation to make.
>
> 78. Moreover, as I hope I have made clear in the preceding paragraphs, the Ackerman Group, and in particular the offshore structure that was the subject of the Nof Claim, is a large and complicated array of companies and structures and we were totally shut out from its set up or operation for a number of years. It took us a long time to get to grips in particular with exactly what there was offshore and how all the different companies were related. As I have said, we had not been assisted in this regard by Hassans, Mr Levy or Mr Felice, who held the keys to the information about the offshore structure in particular. Consequently, at the time that we issued and then pursued the Nof Claim our focus was the companies within the Nof Trust and their lending. Of course, the Loans that are the subject matter of these claims are not within that structure and sit entirely outside of it."

59 On December 19th, 2007, a further Ackerman Group company, Park Lane Alliance ("PLA") made a loan of about £5.8m. to Star Poland Ltd.

("Star Poland"). Star Poland was incorporated in December 2007 and is said by the claimants to have been part of the Star Trust. Star Poland's directors were Ian Felice, Christopher White and Nadine Collado (who worked for Hassans). PLA's directors were Investec, the same professional service firm that acted as directors of Lexham and Marylebone.

60 The loan from PLA was due to be repaid in 2017 but fell due early upon a default on payment of interest. The directors of PLA began to make demands for repayment in 2011. In November 2011, the directors of PLA brought proceedings against Star Poland for the repayment of the loan and, in December 2012, Star Poland's directors declared it to be insolvent and it was placed into voluntary liquidation. The liquidator's investigations are said to have focused on locating the land in Poland for which the loan moneys were said to have been used. After around three years, it was concluded that Star Poland did not hold a direct interest in the land in question over which the liquidator could directly enforce. In December 2016 the liquidator caused Star Poland itself to bring proceedings against its former directors. According to Barry he had access to the letter of claim sent in December 2016 and the pleadings which were filed in around July 2018, and he considered the information therein as to the PLA loan moneys. As Barry puts it at para. 89 of his witness statement:

> "89. This led me to realise for the first time the extent to which Mr Felice and Hassans had been blindly following the instructions of Joseph without regard even to the interests of companies held within the (by then) White Star Trust structure, despite the fiduciary duties they owed. This caused me to question whether their involvement and wrongdoing had extended much wider than just the Nof Trust within the Ackerman Group."

And later:

> "91. Following the settlement, I was informed of the settlement sum and noted that Hassans and Mr Felice had basically settled for the full amount of the claim. This strongly indicated to me that they knew that they were in the wrong and that they were not able to justify their behaviour as directors of the borrowing entity. This reinforced the view that I had formed when reading the pleadings for myself.
>
> 92. These developments caused me to begin considering in a new light the loans that had been made by other Ackerman Group companies to entities controlled by Mr Levy, Mr Felice and/or other persons or companies associated with or controlled by Hassans and monies they could have received from the Ackerman Group . . . These developments in the Star Poland proceedings changed that picture, and suggested both that the Defendants may have had a much wider role than we had previously appreciated, and that their dishonestly [*sic*] may have

> extended beyond that alleged in the Nof Claim concerning their roles as office holders within the Ackerman Group.
>
> . . .
>
> 94. Following the conclusion of the Star Poland proceedings and as a result of my concerns, I arranged for the former directors of Lexham and Marylebone (Investec, by then renamed Accuro) to be contacted and I asked for copies of their historic files in order to try to understand the basis on which these particular loans had been made, so that I could check if there was any information regarding Hassans being involved in the creation of the loans. The Lexham and Marylebone directors provided their file in October 2020."

61 According to Barry's evidence, Investec provided their files on October 2nd, 2020, which included a run of correspondence from November 8th to around November 22nd, 2006, which included the request for shareholder approval by the directors of Lexham and Marylebone which he had not previously seen. It is Barry's evidence that it became clear that at the time that the loans were being arranged. Further that at least Mr. Felice was aware both that Investec, as directors of Lexham and Marylebone, had specifically sought shareholder consent for these loans from Kingstar and Rosestar, and yet Naomi's consent as fellow director of both of these companies had not been sought or obtained, but instead Joseph had unilaterally approved the loans on Kingstar's and Rosestar's respective behalf. And that at least Mr. Felice would have been aware of this fact. Stripped back, this is the basis upon which it is said in this claim that the defendants acted dishonestly in relation to the loans.

62 Also, according to Barry, these files made clear the extent of at least Mr. Felice's involvement in the loans, which was far greater than he and Naomi previously had reason to suspect, and that although he had previously been aware of the fact that the loans had been made to Enduring, without Naomi's consent, and that the sums had been lost to the Ackerman Group, he had not, until this point, had cause to question the role that Hassans had played in the making of these loans. That although Naomi and he had concerns in relation to Hassans' behaviour that was the subject of the NOF claim, that that was in relation to a specific set of companies and transactions, and at that point in time they did not have any reason to think that that pattern of behaviour would extend to the subject matter of the present claim, in circumstances in which Hassans had acted outside of the NOF Trust and only for the non-Ackerman Group borrowing party. That it took the unearthing of the same pattern of behaviour in the Star Poland claim, and subsequent developments in those proceedings, to set Barry on the train of enquiry that ultimately uncovered the behaviour in relation to the present claim.

The law

Summary judgment

63 Both the limitation and the indemnity applications are applications for summary judgment. CPR 24.2 provides:

> "**24.2** The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—
>
> (a) it considers that—
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

64 The principles that apply are well established and very usefully set out by Lewison, J. (as he then was) in *Easyair Ltd. (t/a Openair)* v. *Opal Telecom Ltd.* (8) and subsequently approved by the English Court of Appeal in a number of cases (see, for example, *AC Ward & Son* v. *Catlin (Five) Ltd.* (2) and *TFL Mgmt. Servs. Ltd.* v. *Lloyds Bank plc* (17) ([2009] EWHC 339 (Ch), at para. 15):

> "15. . . . the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: *Swain v Hillman* [2001] 1 All ER 91;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the

application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725."

65 Also, of some relevance in the present case, is the principle that it is not generally appropriate to strike out a claim on assumed facts in an area of developing law, and that decisions as to novel points of law should be based on actual findings of fact (see *e.g. Begum* v. *Maran (UK) Ltd.* (6)).

Limitation

66 The claimants accept that, subject to the postponing effect of s.32(1)(a) of the Limitation Act, the primary 6-year limitation period for their claims has expired. Section 32(1)(a) provides:

"**Postponement of limitation period in case of fraud or mistake.**

32.(1) Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims . . .

the period of limitation shall not begin to run until the claimant has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it . . ."

67 Coincidentally, the equivalent English statutory provision is to be found at s.32(1)(a) of the English Limitation Act 1980. It provides:

"**Postponement of limitation period in case of fraud, concealment or mistake.**

(1) Subject to subsections (3), (4A) and (4B) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; . . .

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

Although the language used in the provisions is not identical, it is not in issue that the test to be applied for postponing the limitation period in a case of fraud is the same in Gibraltar as it is in England. The English authorities dealing with the English provision are therefore wholly apposite. Unless specifically referring to the English provision, when referring to s.32 I refer to the provision in the Gibraltar Limitation Act.

68 It is not in issue that a claim for dishonest assistance is an action based on an allegation of fraud. Whether in fact there was a fraud is only capable of being determined at trial, but for present purposes it is common ground that the application falls to be determined upon the assumption that there was a fraud as set out in the claimants' pleaded case.

69 It is well established that pleading fraud is a serious step. In *Federal Deposit Ins. Corp.* v. *Barclays Bank plc* (9), Snowden, J. (as he then was) (in the context of a concealment case) reviewed the authorities on pleading dishonesty and referred to the judgment of Sales, L.J. (as he then was) in *Playboy Club London* v. *Banca Nazionale Del Lavoro* (15) who said ([2018] EWCA Civ 2025, at para. 46):

> "The pleading of fraud or deceit is a serious step, with significance and reputational ramifications going well beyond the pleading of a claim in negligence. Courts regard it as improper, and can react very adversely, where speculative claims in fraud are bandied about by a party to litigation without a solid foundation in the evidence. A party risks the loss of its fund of goodwill and confidence on the part of the court if it makes an allegation of fraud which the court regards as unjustified, and this may affect the court's reaction to other parts of its case."

Thereafter Snowden, J. referred to the explanation of Lord Millett in *Three Rivers D.C.* v. *Bank of England (No. 3)* (20), as to why an allegation of dishonesty must be pleaded with sufficient particularity ([2003] 2 A.C. 1, at para. 186):

> ". . . an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

Snowden, J. encapsulated those principles, in terms of parties having to be reticent about pleading allegations of fraud and deceit, and not doing so without a solid foundation in the evidence, to be contrasted with speculation and inference. Snowden, J. (*ibid.*, at para. 44) went on to warn against reliance upon hindsight as follows:

> "care must be taken not to overstate the inferences that could legitimately have been drawn from earlier materials by a subconscious use of hindsight drawn from the later materials. The analogy frequently used in cases in which inferences are required to be drawn from circumstantial evidence is that of a cord consisting of a number of strands, any one of which may be inadequate on its own to sustain the weight of a particular finding, but where several strands taken cumulatively will justify the inference: see e.g. Arif v HMRC [2006] EWHC 1262 (Ch) at [22] per Lewison J."

These principles evidently impact upon the application of the s.32(1)(a) test.

71 Although the overall burden on the summary judgment/strike out applications is upon the defendants, the claimants properly accept that the burden is on them to establish that they could not with reasonable diligence have discovered the alleged fraud before December 18th, 2014. (See para. 63 of the defence and para. 45 of the reply and *Paragon Finance plc* v. *D.B. Thakerar & Co.* (14) ([1999] 1 All E.R. at 418, below).

72 Under s.32, the limitation period does not begin to run until the claimant has discovered the fraud, or could with reasonable diligence have discovered it. For the purposes of the present application the issue of actual discovery of the alleged fraud is not contested by the defendants. Therefore, the key question is, when could the claimants have with reasonable diligence discovered the alleged fraud. The present claim having been issued on December 18th, 2020 the key date when determining that issue is December 18th, 2014.

73 A number of English Court of Appeal decisions make clear, and it cannot be in issue, that the English Limitation Act 1980, s.32(1)(a) (and consequently our s.32(1)(a)) is not to be interpreted either broadly or narrowly but in a way that gives effect to its statutory purpose. As Males, L.J. put it in *OT Computers Ltd.* v. *Infineon Technologies AG* (10) ([2021] Q.B. 1183, at para. 25):

> ". . . [T]he 1980 Act strikes a balance. Section 32 (like the other provisions of Part 2 of the 1980 Act) qualifies the certainty otherwise provided by the primary (or ordinary) limitation periods set out in Part I. This means that the 1980 Act does not pursue an unqualified goal of barring stale claims. Rather, its pursuit of that objective is tempered by a principle of fairness, in particular 'that it would be unfair for time to run against a claimant before he could reasonably be aware of the circumstances giving rise to his right of action'. The purpose of section 32 is to avoid that unfairness. It is therefore necessary to interpret the section so as to give effect to this purpose and not to defeat it."

74 The approach to be taken when determining whether a claimant could have discovered the fraud is to be found in the authoritative statement of Millett, L.J. in *Paragon Finance plc* v. *D.B. Thakerar* ([1999] 1 All E.R. at 418):

> "The question is not whether the plaintiffs *should* have discovered the fraud sooner; but whether they *could* with reasonable diligence have done so. The burden of proof is on them. They must establish that they *could not* have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.

> In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree." [Emphasis in original.]

That passage was relied upon by Males, L.J. in *OT Computers* (10) in which he reviewed the authorities dealing with s.32 of the English Act. The following points and principles which can be drawn from the judgment of Males, L.J. are relevant to the issues which fall for determination in this application:

(i) The statutory test to be applied is the same, irrespective of whether there is fraud, concealment or mistake. There is a single test, the application of which differs according to the circumstances ([2021] Q.B. 1183, at para. 49).

(ii) The established test (at least before the United Kingdom Supreme Court decision *Test Claimants in the FII Group Litigation* v. *Revenue & Customs Commrs.* (19)) as to the state of knowledge which a claimant must have in order for it to have discovered the fraud is knowledge sufficient to enable it to plead a claim ([2021] Q.B. 1183, at para. 26) (the "statement of claim" test). As in *OT Computers* the possible modulation to the test in *FII Group Litigation* is not a point which falls to be considered in the present case, in that although raised in the defendants' skeleton submissions, it is accepted by Mr. Stewart that it would be inappropriate on a summary judgment/strike out application to undertake an analysis and make a determination with regards to the possible new approach which may be derived from the United Kingdom Supreme Court judgment (see *Libyan Investment Auth.* v. *Credit Suisse Intl.* (12) ([2021] EWHC 2684 (Comm), at para. 32)).

(iii) In some cases discovery of the relevant facts will involve a process over time so that it becomes difficult to determine when a claimant exercising reasonable diligence could have been able to plead the claim—see *OT Computers* ([2021] Q.B. 1183, at para. 27).

(iv) ". . . [A]lthough the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required

> once the claimant is on notice that there is something to investigate (the 'trigger'), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section." See *OT Computers* (*ibid.*, at para. 47).

(v) The degree of diligence required is to be tested objectively. The question that has to be answered is what the claimant could have learned if he had exercised such reasonable diligence, by reference to the actual claimant and not a hypothetical claimant—see *OT Computers* (*ibid.*, at para. 48. And later see (*ibid.*, at para. 59):

> "In achieving that purpose it is appropriate to set an objective standard because it is not the purpose of the law to put a claimant which does not exercise reasonable diligence in a more favourable position than other claimants in a similar position who can reasonably be expected to look out for their own interests."

75 Although not a statement of principle, or at least not adopted as such by the Court of Appeal in *OT Computers* on appeal, at first instance, Foxton, J. in *Granville Tech. Group Ltd.* v. *Infineon Technologies AG* (10) ([2020] EWHC 415 (Comm), at paras. 47–48) provided guidance as to what can amount to a trigger:

> "47. However, the issue of whether there was something to put the claimant on such notice must be determined on an objective basis.
>
> 48. There will be many claims when it will be objectively apparent that something 'has gone wrong'—where the claimant has lost property, failed to receive something it expected to receive, or suffered an injury of some kind—which event ought itself to prompt the claimant to ask 'why?' and investigate accordingly."

The defendants' submissions in outline

76 There are two principal strands to the submissions advanced on behalf of the defendants, namely:

(i) that there was a pleadable case absent the Investec documents; and

(ii) that the Investec documents could have been obtained much sooner.

Pleadable case absent the Investec documents

77 Mr. Stewart's submissions as regards the claimants' case being capable of being pleaded without the Investec documents is largely predicated upon the particulars of claim in the NOF claim. In that claim Naomi and Barry pleaded that at the material times Mr. Felice was a director of Enduring, Carlton and Maxtel and that Mr. Levy was a director of Enduring and Maxtel. Naomi and Barry also asserted at paras. 38 and 39 of those pleadings that:

> "38. In November 2006, at [Joseph's] instigation, Enduring, Maxtel and Carlton between them acquired two large property portfolios known as the Royal Portfolio (which was purchased from the trustees of the Philips Pension Fund) and the Liberty 2 Portfolio (which was a purchase and leaseback transaction with RBS).
>
> 39. In order to assist in financing the purchase of the Royal and Liberty 2 Portfolios, at [Joseph's] direction:
>
> 39.1. Rosara refinanced its loan facility with RBS by obtaining two further loans, together totalling £59m (the 'Rosara Refinancing'); and
>
> 39.2. the following loans were purportedly made:
>
> (i) £4.5m loaned by Rosara to Enduring purportedly on terms recorded in a 7% unsecured loan note 'deemed to take effect from' 24 November 2006 with interest payable quarterly which was signed by [Mr. Felice];
>
> (ii) £5,913,076 loaned by Rosara to Maxtel purportedly on terms recorded in a 7% unsecured loan note 'deemed to take effect from 4 December' 2006 with interest payable quarterly which was signed by [Mr. Felice] . . ."

At para. 41 they then went on to plead that those loans were made to the knowledge of and arranged by Mr. Levy and Mr. Felice. In support of that assertion reliance was placed upon Mr. Levy's and Mr. Felice's directorships of the various companies and the management of the NOF Trust assets by Mr. Levy and Mr. Felice together with Joseph and Danny, "as was later found to be the case by Mr Thornhill" in the provisional adjustment report.

78 In effect it is said by Mr. Stewart that in the NOF claim, Naomi and Barry had pleaded that a complex restructuring of the Ackerman Group was taking place and that they referred to matters and transactions taking place in 2006. Further that it is apparent that long before the present proceedings were issued they knew of the making of the loans about which complaint is now made, because they complained about them in their submissions to Mr. Thornhill and because Mr. Thornhill then referred to those loans in his report. Further that they knew also that the borrower was

Enduring and knew of the directorships of the borrower. Further that in the NOF claim they were prepared to assert that the defendants had acted dishonestly in relation to the November 2006 Rosara loans and that the loans the subject of these proceedings were transacted at about the very same time. That therefore this claim could have been pleaded at the same time as the NOF claim.

79 It is further submitted, that although the particulars of claim refer extensively to the Investec documents, this was not necessary to plead a complete cause of action. Further that there is a clear distinction between the evidence required to prove a case at trial, and the essential facts which constitute a pleadable cause. In support of that proposition reliance is placed upon the discussion in the judgment of Ramagge Prescott, J. in *Bonavia* v. *AXA Equity & Law Life Assur. Socy. plc* (7) (Supreme Ct., May 14th, 2010, unreported, at para. 71):

> "Clearly the cause of action was known to Mr Bonavia from the start. At best, if anything was concealed from him, it was not the existence of a cause of action but of certain documentary proof in support of his cause of action. The issue is succinctly put by Sir John Donaldson in Frisby v Theodore Goddard & Co Times March 7 [1984] where he states:
>
> > 'A right of action may be concealed by hiding one or more of these essential facts from the potential plaintiff. But that did not occur and the plaintiff does not suggest that it did. His compliant is that certain evidence was concealed which he says would have supported his right of action. This is something wholly different. Having a right of action and knowing you have it is one thing. Being able to prove it is another. Bridging this gap when all or an important part of the evidence is or may be in the hands of the Defendants is the function of discovery.'"

It is submitted that what was required to plead a complete cause of action in dishonest assistance was identification of the breach of fiduciary duty, the acts of assistance and why that assistance was dishonest.

80 In support of the submission that the claimants knew about Joseph's breaches of duty by unilaterally approving the loans, reliance is placed upon Barry's witness statement who at para. 21 states: "Although we knew that Joseph had unilaterally approved the Loans on behalf of Kingstar and Rosestar . . ." It is said that consequently the focus must be on the alleged dishonest assistance afforded by the defendants. In that regard the submission advanced is that Barry and Naomi knew that Mr. Levy and Mr. Felice were directors of Enduring and that Enduring was the borrower. That therefore assistance could have been properly pleaded by the simple assertion that Enduring was a party to the loans and that it is to be inferred that Mr. Levy and Mr. Felice assisted in procuring them. That therefore the

Investec documents although exhaustively pleaded, were an unnecessary elaboration to plead a complete cause of action.

81 As regards dishonesty, the submission advanced is that the matters pleaded at 50.3 and 50.4 of the particulars of claim, are not derived from the Investec documents and could therefore have been pleaded without them. These paragraphs read:

> "50.3. that the relevant transactions were made from Ackerman Group companies to companies in which only Joseph's side of the family were interested. In this respect, the Claimants rely upon the following:
>
> 50.3.1. Mr Levy and Mr Felice's close involvement in the affairs of the Group and familiarity with its ownership (see paragraphs 8 and 19 above).
>
> 50.3.2. Mr Levy and Mr Felice's involvement in the establishment of the Star Trust (and knowledge of for whose intended benefit it had been established) and incorporation of Enduring and Baza, each of which had been settled or incorporated (respectively) only a matter of days before the Loan Notes were entered into (see paragraphs 15–17, 35 and 49.1).
>
> 50.3.3. Mr Levy and Mr Felice's position as directors of Enduring and/or Baza (see paragraphs 17 and 35 above).
>
> 50.4. that the Loan Notes were made at a time when the Ackerman Group was undergoing a demerger and when Naomi was concerned (and had repeatedly expressed those concerns) about Joseph using Group assets for his own account. In this respect, the Claimants rely upon paragraphs 15–28 above."

It is further submitted that, to the extent that it was necessary to plead that the defendants knew that Naomi's consent to the transactions had not been obtained (or were reckless as to this), that this could have been pleaded without the Investec documents. That the inference was pleadable based on the alleged fact that the defendants had not obtained Naomi's consent.

82 Premised upon the foregoing, the overarching submission is that the "statement of claim" test was satisfied at least at the time of the NOF claim.

The Investec documents could have been obtained much sooner

83 The defendants rely upon Barry's first witness statement at para. 94, set out at para. 60 above, in support of the submission that Barry does not identify any impediment, difficulty or refusal on the part of Investec to supply the Investec documents. But that rather the evidence suggests that Barry was provided with the Investec documents shortly after he requested them. Mr. Stewart goes on to make the point that it is unsurprising that the

claimants, as the only shareholders in Lexham and Marylebone, should have easily been able to obtain documents from Lexham and Marylebone's former directors. Allied to that, it is further submitted that asking for these documents self-evidently did not amount to an "exceptional measure" that could not have taken place before December 18th, 2014.

The claimants' submissions in outline

84 The claimants' primary case as regards limitation is to be found in their reply at paras. 41–47. Essentially, they aver that they discovered the fraud for the purposes of s.32 on October 2nd, 2020, that being the date when they received the Investec documents. Further that the documents provided revealed for the first time to the claimants:

> "42.1 The Defendants' dishonesty in assisting Joseph's breach(es) of his fiduciary duties to Kingstar and Rosestar. In particular, the Claimants had not until that time known that the Defendants had been aware at the time (of facts and matters so as to put them on notice) that Joseph had acted unilaterally, without seeking Naomi's consent, and in breach of his fiduciary duties to the Claimants.
>
> 42.2 The Defendants' assistance in respect Joseph's breach(es) of his fiduciary duties concerning the (November 2006) Loan Notes."

Further that until they received the Investec documents, they did not have a pleadable case as regards the fraud alleged against the defendants. It is said that applying the "statement of claim" test, it is the facts revealed by the Investec documents that provided the evidential foundation for sufficient particulars to plead the fraud. That it is well established that pleading fraud is a serious step that must never be taken speculatively without a solid foundation in the evidence and the giving of sufficient particulars with reliance placed in this regard upon *Three Rivers D.C.* (20) and Snowden, J.'s warning against reliance upon hindsight in *FDIC* v. *Barclays* (9).

85 Emphasis is also placed upon the principle that what a claimant must discover and/or must be shown that they could with reasonable diligence have discovered, is the precise fraud that is alleged to have been perpetrated against them. Reliance is placed upon *Allison* v. *Horner* (3) ([2014] EWCA Civ 117, at para. 14) where Aikens, L.J. (with whom Davis and Richard, L.JJ. agreed) referred to *Barnstaple Boat Co. Ltd.* v. *Jones* (5) and to the sole reasoned judgment of Waller, L.J. (with whom Moore-Bick and Moses, L.JJ. agreed) and the holding in that case that the phrase "the plaintiff has discovered the fraud" in (the English) s.32(1) refers to knowledge of the precise deceit which the claimant alleges had been perpetrated on him. Further Aikens, L.J. went on to state: "It follows that

knowledge of a fraud in a more general sense is not enough to start the limitation period running under section 32(1)."

86 Essentially the claimants' primary case on limitation is that they could not with reasonable diligence have discovered the fraud until they received the Investec documents in 2020, and that there was no trigger until that time. That the fact that a claimant suffers loss or has been defrauded by A does not on its own constitute a trigger for a claim against B.

87 In the alternative, it is said that the trigger arose by reason of the developments in the Star Poland proceedings and therefore, in any event, later than December 18th, 2014. It is submitted that there was no trigger until Barry became aware of allegations advanced against (amongst others) Mr. Felice, to the effect that Mr. Felice had acted in breach of his fiduciary duties when acting for a company within the Star Trust and on the borrower side on the original loan from PLA which was within the Group. Those allegations included that Mr. Felice had permitted payments from PLA to companies controlled by Joseph, despite the lack of prospect of repayment and in particular had allowed for considerable sums to be passed to a consultancy business operated by Danny and Joseph. In short that this suggested to Barry that Mr. Felice's capacity to engage in fraudulent wrongdoing to assist Joseph extended beyond the NOF Trust and/or the loans concerning the Royal and Liberty 2 Portfolios.

88 It is further submitted that Barry's views were confirmed by the liquidator concluding that there was no prospect of Star Poland being able to make a recovery against the Polish land. Further that this suggested to Barry that Mr. Felice must have breached his fiduciary duty to Star Poland. Also, that despite not being a party to the proceedings or present at the Star Poland mediation, Hassans offered a substantial sum to Barry to settle any unspecified further claims, and that Barry learned that the Star Poland directors had settled for essentially the full amount of the claim. Further that these developments led Barry to question Hassans' role beyond their involvement in the NOF Trust and related companies and transactions, including the loans the subject of these claims and that it was this that led to the request for the Investec documents.

89 In a broader context, and taking account of the knowledge of the loss, the determinations in the Thornhill reports and the NOF claim, in effect it is submitted that there was at the time (until receipt of the Investec documents) no linkage between the Lexham and Marylebone loans and the defendants. Further that no part of the demerger process or the Thornhill reports provided any objective basis upon which to establish a link between the defendants and the loans the subject of these proceedings. Also, that before Mr. Thornhill's decision, Naomi and Barry didn't have access to the information about Kingstar and Rosestar or Lexham and Marylebone, because that information was controlled by Joseph. Further that once Mr.

Thornhill made his decision there was no handover of information from Joseph and that by the time Mr. Thornhill had made his decision there was, at that stage, no reason for Barry or Naomi to start investigating the Lexham and Marylebone loans.

90 As regards the NOF claim it is submitted that, as its label suggests, it involved a claim about the NOF Trust, brought by Naomi and Barry as beneficiaries and therefore importantly the claim only included claims that could be made by beneficiaries of the trust. That consequently the defendants in the NOF claim were sued either *qua* trustee of the NOF Trust or as directors of companies owned by the trust. Additionally, that the causes of action against the defendants were in respect of their actions on the NOF Trust or lender's side transactions. It is submitted that that is in contrast to the claims in the present proceedings which are not about the defendants' breach of duties on the lenders side (in that none of the defendants were directors of Kingstar, Rosestar, Lexham and Marylebone, or owed them any duties) but that rather the present claim involves liabilities on the part of the defendants whilst acting on the borrowers' side of the transactions.

91 As regards any reliance which could be placed by the defendants upon the Wallshire allegations in the NOF claim, the short submission, and one which I accept, is that as the pleadings show, these allegations were not advanced until 2015, and therefore within six years of the present claim being issued.

Discussion

92 With the caveat that the allegations of dishonest assistance have not been the subject of judicial determination, I nonetheless note the language and sentiment of Males, L.J. in *OT Computers* ([2021] Q.B. 1183, at para. 60) that it is unnecessary to be too sympathetic to defendants who have allegedly committed fraud and who, if they have potentially committed a wrongdoing and wish to ensure that the limitation period begins to run, can always make a clean breast of what they may have done. The defendants compromised the NOF claim and had they chosen to, could have been transparent about how they conducted themselves in other Group transactions in which losses were suffered.

93 That said, emotion plays no part in what is an objective assessment of the evidence, with the parties carrying different burdens. The burden is on the claimants, who bring the claim outside the primary limitation period, to establish that they can rely upon the statutory postponement which s.32(1)(a) affords and that they could not, with reasonable diligence, have discovered the alleged fraud sooner. Evidently, however, this is an application for reverse summary judgment brought by the defendants, and the burden is on them to establish that the claimants do not have a realistic

prospect of establishing at trial that they could rely upon the statutory postponement.

94 Bearing in mind the burdens I have referred to, the question which falls for determination is whether the Thornhill reports and the identification of the losses suffered and/or the NOF claim, the former distinctly or both cumulatively, establish a trigger? That is to say, did these matters put the claimants on notice of the need to investigate the alleged "particular fraud." I am mindful that in making that assessment, as Males, L.J. made clear in *OT Computers*, the reasonable diligence objective test is also applicable.

95 That Naomi was aware of the losses suffered by Lexham and Marylebone is beyond dispute. The email on behalf of Mr. Thornhill dated October 26th, 2010 under the subject "The Way Forward," identified adjustments proposed by Naomi as including funds taken from Lexham and Marylebone. It is of note that the email reflects Mr. Thornhill taking account of some 25 proposed adjustments which had been advanced by Naomi and Joseph, of which the Lexham/Marylebone entry was one. The evidence as to the broader circumstances also bears some consideration and of some significance is Barry's evidence that the Ackerman Group was "a large and complicated array of companies and structures" and that Naomi and Barry "were totally shut out from its set up or operation for a number of years."

96 There will undoubtedly be very many cases in which suffering a loss will of itself make it objectively apparent, as Foxton, J. put it in *Granville* (10), that something "has gone wrong" and there is merit in the proposition that (interest aside) the loss of a sum in excess of £3m. would almost always put someone on notice of the need to investigate. That said, given the complex factual matrix and Naomi and Barry's alleged exclusion from information, there is a real prospect of success in the claimants' argument that the losses suffered by Lexham and Marylebone did not make it objectively apparent that something had gone wrong (beyond the losses themselves) so as to put the claimants on notice of a need to investigate.

97 In the event that in due course there is a determination that the financial loss was indeed a trigger, on the evidence presently before me, it would appear that a reasonably diligent investigation would have involved requesting the transactional documents from Investec and that obtaining these would not have proved difficult.

98 I turn to the NOF claim. The analysis of whether it provided the trigger must evidently be undertaken against the backdrop that Naomi and Barry had knowledge of the losses suffered by Lexham and Marylebone.

99 The NOF particulars evidence the fact that Barry and Naomi were aware that:

(i) the Star Trust (which held Enduring) was settled with the intention of benefitting only Joseph's side of the family;

(ii) Mr. Levy and Mr. Felice were directors of Enduring. (Consequently they should also have been aware that in the Lexham and Marylebone loans Mr. Levy and Mr. Felice would have been involved in the borrower side of the transaction);

(iii) Mr. Levy was aware of the October 2006 letter; and

(iv) in the NOF claim the defendants participated in the arrangement of the loans, despite the absence of Naomi's consent.

100 I understand the reliance that the claimants place upon the fact that although the defendants acted on both sides of the transaction in the NOF claim, the allegations concerned only their role on the lender side. But that deals with the framing of the claim not with the factual matrix of which Barry and Naomi would have been aware. The distinction between the transactions in both sets of proceedings is not something which materially assists the claimants.

101 That said, I caution myself against the danger of hindsight and remind myself that it is the "particular fraud" which claimants need to be on notice of. For the purposes of the present application, it can properly be argued that given the complex Group structure and in the absence of knowledge and/or an understanding by Naomi and Barry of:

(i) the corporate framework of both the lending and borrowing companies and their directorships;

(ii) the requests made by the directors of Lexham and Marylebone;

(iii) what in fact was provided to Lexham and Marylebone's directors; and

(iv) the defendants' knowledge of Joseph's alleged breaches of his fiduciary duties to the claimants,

the NOF claim was an insufficient trigger to put the claimants on notice of the need to investigate the loss and consequently the alleged fraud. I am fortified in that view given that other professionals, including Ms. Cottrell of Shepherd and Wedderburn, acted for the claimants in the transaction. This would arguably weigh against a suspicion that the defendants had acted dishonestly, as would the fact that the defendants are a professional law firm and senior experienced lawyers who are highly regarded. The latter, notwithstanding the allegations advanced in the NOF claim. Naomi and Barry may legitimately have not suspected them of what they now say are further instances of dishonesty. These are evidential issues which merit examination at trial.

102 For the purposes of a summary judgment application the foregoing is also an answer to the submission that there was a pleadable case without the Investec documents. If there was nothing to put the claimants on notice of the need to investigate, they would not be aware of the alleged dishonesty and that is evidently a prerequisite to pleading any such cause of action.

103 In my judgment the defendants may have the better part of the argument, but not sufficiently so as to establish that the claimants do not have a realistic prospect of establishing at trial that they could not with reasonable diligence have discovered the alleged fraud before December 18th, 2014. For these reasons the application for summary judgment on the issue of limitation is dismissed.

The indemnity application

104 The claim to an indemnity is made in the additional claim brought by the defendants against Naomi and Barry personally.

The NOF deed

105 By a deed of settlement dated July 3rd, 2015 ("the NOF deed") entered into by Naomi, Barry (referred to in the deed as "the claimants") Line Trust, Hassans, Mr. Levy, Mr. Felice (referred to in the deed as "the defendants") and Bana One, the parties settled the NOF claim. The defendants rely on an indemnity given by Naomi and Barry at cl. 9 of the NOF deed which provides:

> "INDEMNITY
>
> Once the Settlement Sum is paid, the Claimants each jointly and severally agree to hold harmless and indemnify each of the Defendants against any claims, demands or actions (including, but not limited to, any claim for contribution, interest or costs), whether known or unknown and of whatever nature and whether in law or in equity, *which arise directly from, indirectly from or in connection with the facts on which the Claims are based or the Claims themselves* (the 'Indemnified Claims'), and against the Defendants' reasonable costs and expenses of defending such Indemnified Claims. The Defendants agree to take all reasonable steps to monitor and mitigate their costs and expenses. The indemnity provided in this Clause is provided solely in relation to Indemnified Claims which are *brought by or on behalf of* any past. present or future member of the NA Class whether born or unborn as at the date of this Deed, or by any assignee, transferee, principal or agent thereof and, for the avoidance of doubt, no indemnity is provided in relation to any claims brought by any other persons or entities." [Emphasis as added in the particulars of additional claim.]

"Claims" are defined at recital (C) by reference to the NOF claim which is defined as the "Proceedings." "Claims" are thereafter defined as:

> "The Proceedings, all claims made within the Proceedings, all Statements of Case (as amended and re-amended and including drafts thereof and those amendments for which permission has not been granted) prepared and/or served in the Proceedings . . ."

The "NA Class" is defined at recital (D) as:

> "members of a named class of discretionary beneficiaries under the Nof Settlement consisting of [Naomi] and her children and remoter issue . . ."

106 Pursuant to cl. 5, Naomi and Barry (as claimants in the NOF claim) and Bana One released each of the defendants from all claims *etc*. "arising directly from, indirectly from or in connection with the facts on which the Claims are based or the Claims themselves."

107 Pursuant to cl. 6 the defendants gave an equivalent release to Naomi, Barry, and Bana One, on their own behalf and on behalf of the "Subsidiary Companies" which included Enduring which had been held within the structure of the Star Trust and then the White Star Trust.

108 Clause 7 made plain that the general releases did not apply to Joseph.

109 Pursuant to cl. 8 each party agreed not to sue the others in relation to claims "known or unknown" "arising directly from, indirectly from or in connection with the facts on which the Claims are based or the Claims themselves."

Principles of construction

110 The general principles of the construction of contracts are well established and applicable. They were recently distilled by Carr, L.J. in *ABC Electrification Ltd.* v. *Network Rail Infrastructure Ltd.* (1) ([2020] EWCA Civ 1645, at para. 18) and thereafter summarized (*ibid.*, at para. 19) as follows:

> "Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by

> which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

111 Albeit that in the application of those general principles account must also be had of the cautionary principle expressed by Lord Bingham in *BCCI* v. *Ali* (4) ([2001] UKHL 8, at para. 10) "the (draft re-amended) particulars of claim in the NOF claim in 2015":

> "10. But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."

And thereafter (*ibid.*, at para. 17):

> "Some of the cases, I think, contain statements more dogmatic and unqualified than would now be acceptable, and in some of them questions of construction and relief were treated almost indistinguishably. But I think these authorities justify the proposition advanced in paragraph 10 above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this."

112 There is also the additional issue open to debate, as to whether in certain circumstances when a general release is relied upon, there exists a doctrine of "sharp practice." This possible doctrine was described in *obiter* comments in *BCCI* v. *Ali.* Lord Nicholls put it as follows ([2001] UKHL 8, at para. 32):

> "32. Thus far I have been considering the case where both parties were unaware of a claim which subsequently came to light. Materially different is the case where the party to whom the release was given knew that the other party had or might have a claim and knew also that the other party was ignorant of this. In some circumstances seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy."

Whilst Lord Hoffmann expressed it as (*ibid.*, at para. 70):

> "a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim."

The defendants' submissions in outline

113 The defendants' overarching submission is that as a matter of construction the indemnity captures the claims which are the subject of the present proceedings. It is submitted that the scope of the indemnity is

expressly wider than the NOF claim, extending to claims which arise "directly from indirectly from or in connection with the facts on which the Claims are based" and that it captures claims "whether known or unknown." As regards "unknown" claims there is an element of dovetailing with the issue of limitation, in that it is said that Naomi and Barry should have known about the present claim.

114 Whilst it is evident that the indemnity extends beyond the specific loan transactions the subject of the NOF claim, the issue which arises is what transactions? For the defendants it is said that one must consider the backdrop to the NOF deed which they summarize in their skeleton submissions as follows:

> "1. The allegations being settled involved the complex web of companies and trusts comprising the Ackerman Group.
>
> 2. The fundamental allegation in the Nof Claim was that the Defendants had dishonestly procured loans from companies in which Naomi and Joseph had an equal interest to companies in which only Joseph had an interest.
>
> 3. The loss claimed by Naomi and Barry was an attempt to recover the shortfall from the amounts Andrew Thornhill QC had found Joseph ought to pay Naomi . . . The Nof Claim referred to the total amount Andrew Thornhill QC had ordered Joseph to pay. Those sums included the losses in the present Claim.
>
> 4. It was known to all parties to the 2015 Nof Deed that loans had been made from Ackerman Group companies outside the Nof Trust structure to companies whose directors included Mr Levy QC and Mr Felice. These loans (including the November 2006 Loans) were the subject of Mr Thornhill QC's determinations."

115 Additionally, as regards the distinction drawn by Naomi and Barry, premised upon the fact that in the NOF claim the defendants acted on the lender side of the loans whilst in the present claim they acted on the borrower side, reliance is placed by the defendants on the Wallshire allegations which were added in the draft re-amended particulars in the NOF claim, in which transaction the defendants also acted on the borrower side.

116 Flowing from the foregoing it is submitted for the defendants, that the present claim is connected with the facts of the NOF claim and/or arises indirectly from those facts in that both concern loans made from Ackerman Group companies to *inter alia* Enduring; that both allege that the loans were made from companies in which Naomi and Joseph had an equal interest to companies in which only Joseph had an interest; both allege that the defendants acted dishonestly to procure these loans; both rely on the absence of Naomi's consent to the loans as a particular of dishonesty and

that both are concerned with losses caused to entities within the Bana One group.

117 As regards the scope of the indemnity, it is submitted that Naomi and Barry provided an indemnity to the defendants in respect of claims brought not only by them but also "by or on behalf of" persons other than the parties to the NOF deed and that the obvious commercial purpose of the indemnity clause was to capture claims brought by entities whose ultimate beneficial owners were Naomi and her issue—the NA class. That given that the ultimate beneficial owners of Kingstar and Rosestar are Naomi and her issue, the present claim is brought on their behalf in the sense that it will benefit them.

118 Reliance is also placed upon the terms of the NOF deed in that it is submitted that:

(i) pursuant to cl. 6, releases were given to Naomi, Barry and Bana One by the defendants and companies within those trusts—including Enduring;

(ii) that even though Bana One was not a party to the NOF claim, it was made a party to the NOF deed, offered its own releases to the defendants (cl. 5) and agreed not to sue the defendants (cl. 8).

(iii) Bana One was at the time of the NOF deed the parent company to the claimants;

(iv) the recitals in the NOF deed record that the NOF claim referred to the NOF Trust, the Star Trust, the White Star Trust, and the various companies owned within the structures of those trusts, Enduring being one such company; and

(v) as aforesaid, that "the proceedings" included the Wallshire allegations claims relating to loans from companies outside the NOF Trust structure.

It is submitted that given that context, it is plain that the scope of the indemnity extends to the present claim.

The claimants' submissions in outline

119 As put in their skeleton argument, Barry and Naomi rely upon three lines of defence to the indemnity claim against them. Two relate to the proper construction of the indemnity and the third to the supposed doctrine of "sharp practice."

Sharp practice

120 The submission in respect of the application of the supposed sharp practice doctrine is best understood by reference to Naomi and Barry's

pleaded case in their defence to the additional claim, in which the present claims are referred to as the "Alliance claims."

> "14. If, contrary to the above, the Alliance Claim would otherwise fall within the terms of the indemnity under clause 9 of [the NOF deed] then the Defendants are not entitled to rely upon the indemnity in respect of the Alliance Claim as to do so would be unconscionable and would amount to sharp practice.
>
> 14.1. The Claimants were not aware of the Alliance Claim at the time of entering into [the NOF deed]. Nor, to the extent relevant, were Barry or Naomi.
>
> 14.2. For the reasons particularised in paragraph 50 of the Particulars of Claim (in the Alliance Claim), it is to be inferred that the Defendants were aware at the time of entering into [the NOF deed] that the Claimants had or might have a claim against them.
>
> 14.3. Further, at the time of entering into the [the NOF deed] it is to be inferred that the Defendants knew or ought to have known that the Claimants and Barry and Naomi were ignorant of the claims the Claimants had or might have against the Defendants given that: (i) the Defendants had not disclosed their misconduct to the Claimants, Barry or Naomi; and (ii) the claims had not been put to the Defendants by the Claimants, Barry or Naomi.
>
> 14.4. In the premises, the Defendants are not entitled to rely upon the indemnity in respect of the Alliance Claim as to do so would be unconscionable and would amount to sharp practice."

121 It is submitted, and it is a proposition which as I understand is not challenged, but in any event it is one which I accept, that for the purposes of the present application the pleaded case has to be accepted as correct. Flowing from that, it is said that premised upon that pleaded case and the *obiter* statements in *BCCI* v. *Ali* (4) by Lord Nicholls and Lord Hoffmann there is a real prospect that as a matter of law the sharp practice doctrine if it exists, may be applied.

The indemnity does not apply to these claims—only claims brought by certain persons

122 For Naomi and Barry, it is accepted that the final sentence of cl. 9 broadens the class of claimants beyond "the claimants" in the NOF claim and that it includes claims brought by any member of the NA Class. However, it is submitted that the effect of the words "by or on behalf of" cannot as is contended by the defendants extend to include anyone (natural

or legal persons) simply because a member of the NA Class is an ultimate beneficial owner of the claimants.

123 It is submitted that there is no justification for giving such an expansive meaning to that language. That if the parties had intended for cl. 9 to capture claims by any companies in which a member of the NA class was interested, then it could easily have been drafted to say that. And that any such broad construction is inconsistent with the final words of cl. 9: "for the avoidance of doubt, no indemnity is provided in relation to any claims brought by any other persons or entities." That the present claims have never been vested in or capable of being brought by Naomi, Barry or any other member of the NA class, that rather they are and have always been, Kingstar's and Rosestar's claims. And, that the defendants' construction subverts the principle of separate corporate personality by treating members of the NA class as the beneficial owners of Kingstar or Rosestar, with no case having been pleaded contending that the corporate veil be lifted.

The indemnity does not apply to these claims—these claims being based on different facts

124 Clause 9 applies to claims "which arise directly from, indirectly from or in connection with the facts on which the Claims are based or the Claims themselves . . ." As I understand it, the submission advanced is to the effect that there is at least a prospect that the present claims do not fall within the ambit of that definition on the basis that the underlying facts are significantly different in a number of respects. In that regard the submissions in the limitation application contrasting the factual matrix between the NOF claim and the present claim are of relevance. Essentially it is submitted that when looking at the facts on which the claims are based, one must look at the transactions which were the subject matter of the NOF claim and that it is insufficient to say that the present proceedings involve the same type of claims; or the same causes of action or involve the same type of conduct on part of the defendants. That what needs to be established is a factual connection to the NOF claim.

Discussion

125 The principal objection by the defendants to Naomi and Barry's reliance upon the possible doctrine of "sharp practice" is that since it was articulated in the *obiter* comments in the House of Lords in *BCCI* v. *Ali* (4), the doctrine has not been successfully invoked.

126 In *Tchenguiz* v. *Grant Thornton UK LLP* (18) in which Knowles, J. had to determine in a summary judgment application whether the claimants were entitled to advance claims of conspiracy and malicious procurement against a defendant in light of a settlement agreement, he considered the

obiter comments in *BCCI* v. *Ali* and said ([2016] EWHC 865 (Comm), at para. 58):

> "58. These passages in these speeches address a question of the policy of the law. Lord Nicholls and Lord Hoffmann confined their words to a general release. On this application I must reach a conclusion on whether the present case is arguably of the type they describe. My conclusion is that it is not. Although, as Mr Tager QC points out, there is some general wording used, the releases for 'Specified Disputes' are not equivalent to the 'general release' under discussion by Lord Nicholls and Lord Hoffmann. They include a specific release of claims in relation to investigations and actions by authorities and provision of documents and information to authorities."

127 More recently in *Maranello Rosso Ltd.* v. *Lohomij BV* (13) in an application for strike out or summary judgment, the main issue was the extent to which the claimant's dishonesty, fraud and conspiracy claims had been compromised by a settlement agreement. HH Judge Keyser, Q.C., sitting as a judge of the High Court, considered the doctrine of "sharp practice" and said ([2021] EWHC 2452 (Ch), at para. 119):

> "For present purposes, I accept that it is arguable that there is a 'sharp practice' principle, in accordance with the remarks of Lord Nicholls and Lord Hoffmann in *BCCI v Ali*, because there are circumstances in which reliance on the full scope of a release might be an 'imposition in a court of conscience'. It is unnecessary to explore the scope of the principle, if it exists; the general idea is that it will apply, for example, where A, who has perpetrated a fraud on B of which B is unaware, manages to persuade B to enter into a release which is wide enough to cover the fraud but which B in his ignorance assumes will do no more than release claims of a quite different nature of which he is aware."

128 And (*ibid.*, at para. 120) dealing with the question of whether the principle if it exists, applies only to general releases, said:

> "120. However, I do not rest this conclusion on the defendants' submission that the 'sharp practice' principle, if it exists, applies only to general releases and that the release in the Settlement Agreement was not a general release. I remain unconvinced that there is a relevant difference between a release of 'all claims concerning anything' and one of 'all claims concerning such-and-such subject matter', or that the application of an equitable principle that exists to prevent an offence to the conscience of the court can turn on the categorisation of releases (which come in all shapes and sizes) as general or specific."

129 I respectfully agree. I question how there can be a principled difference in the application of the "sharp practice" principle (to the extent that it may exist) between a general release and a more specific release. It is right to say that in *BCCI* v. *Ali* (4), Lord Hoffmann highlighted the fact that a general release has special features, and said ([2001] UKHL 8, at para. 69):

> "A transaction in which one party agrees in general terms to release another from any claims upon him has special features. It is not difficult to imply an obligation upon the beneficiary of such a release to disclose the existence of claims of which he actually knows and which he also realises may not be known to the other party. There are different ways in which it can be put. One may say, for example, that inviting a person to enter into a release in general terms implies a representation that one is not aware of any specific claims which the other party may not know about. That would preserve the purity of the principle that there is no positive duty of disclosure. Or one could say, as the old Chancery judges did, that reliance upon such a release is against conscience when the beneficiary has been guilty of a suppressio veri or suggestio falsi. On a principle of law like this, I think it is legitimate to go back to authority, to Lord Keeper Henley in *Salkeld v Vernon*, 1 Eden 64, 69, where he said: 'no rule is better established than that every deed obtained on suggestio falsi, or suppressio veri, is an imposition in a court of conscience'."

130 A submission that a release from claims "whether known or unknown" albeit thereafter circumscribed to claims "which arise directly from, indirectly from or in connection with the facts on which the Claims are based or the Claims themselves," could in circumstances in which those claims were known by the defendants and not known by Naomi and Barry, result in the implied representation that Lord Hoffmann referred to and/or the application of the principle in *Salkeld* v. *Vernon* (16) and is one which in my judgment carries a realistic as opposed to a fanciful prospect of success. Moreover, and albeit unhurriedly, this is an area of developing law and therefore any decisions in that regard should be based on actual findings of fact.

131 In any event the application for summary judgment and/or strike out also fails because Naomi and Barry's contentions as regards the construction of the indemnity are also arguable to the required standard.

132 Applying the principles of construction of contracts and mindful of Lord Bingham's cautionary principle, the following can be said in favour of dismissing the application for summary judgment and/or strike out on the indemnity:

(i) the language used in the definition of claims covered by the indemnity, namely, "whether known or unknown and of whatever nature and whether in law or in equity, which arise directly from, indirectly from

or in connection with the facts on which the claims are based or the claims themselves" is grammatically clear. Whilst the subjective evidence of the parties' intention is evidently irrelevant, ascertaining whether the present claim is "connected" with the facts of the claims as defined in the NOF deed requires a detailed examination of and testing of the evidence as to what were the surrounding circumstances at the time that the NOF deed was executed. The present application for summary judgment and/or strike out is not a mini trial and those are not issues which can properly be explored at this juncture;

(ii) in interpreting cl. 9, account can properly be taken of the circumstances which existed at the time that the parties entered into the deed and which were either known, or reasonably available to the parties. Whether Naomi and Barry knew or could have reasonably known about the present claims is a live issue for the purposes of limitation but it is also a relevant consideration when interpreting the indemnity;

(iii) it is submitted by the defendants that the NOF claim was an attempt by Naomi and Barry to recover the shortfall from the amounts that Mr. Thornhill had found that Joseph ought to pay Naomi. Although it is accurate to say that there is reference in the NOF pleadings to those losses, the scope of the NOF claim was narrower. That possible distinction is one which needs to be considered, as it forms part of the surrounding circumstances and also impacts upon the commercial common sense which needs to be applied when construing the indemnity; and

(iv) cl. 9 is restricted to claims brought by a member of or "by or on behalf" of a member of the NA Class. The clause explicitly excludes from its scope "claims brought by any other persons or entities." In my judgment, Naomi and Barry have a realistic prospect of success in their submission that the defendants' construction subverts the principle of separate corporate personality.

Conclusions

133 For these reasons, both the defendants' applications for summary judgment against the claimants on the ground that the claim is time barred, and the defendants' application against the third and fourth parties in the additional claim in respect of the indemnity, are dismissed.

134 The abuse of process application is advanced on two bases:

(i) relying upon the rule in *Henderson* v. *Henderson* (11) that the present claims "could and should" have been brought as part of the NOF claim; and/or

(ii) that if the indemnity within the NOF deed applies, it is abusive for the claimants to bring the claim in circumstances in which the ultimate beneficial owners (Naomi, Barry and other of Naomi's issue) would be

required to indemnify the defendants for any moneys that they are required to pay. It is said that this renders the litigation wasteful and in practice pointless.

135 The very short answer to the abuse application is that it is premised upon the arguments advanced for the purposes of the limitation and the indemnity application. The applications for summary judgment and/or strike out on those two issues having been dismissed, it follows that the abuse of process application is also dismissed.

136 Orders accordingly, and I shall hear the parties as to costs, mindful of the comments I made at the start of the hearing when I raised the issue of whether the costs of English solicitors are properly recoverable.

Applications dismissed.
